91-200 (3)



No._____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1991

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ROBERT C. RICHARDS, EDWARD KAUFMAN AND MARTIN ROCHMAN

Petitioners

- v.-

THE STATE OF NEW HAMPSHIRE

Respondent.

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# PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW HAMPSHIRE

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## PETITION FOR WRIT OF CERTIORARI VOLUME III: APPENDICES K TO O

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APPENDIX K

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW HAMPSHIRE

In re:

| | |
|---|---|
| PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, | BK NO. 88-43<br>CHAPTER 11 |

Debtor

MEMORANDUM OPINION ON "RKR" OBJECTIONS RE CONFIRMATION OF PLAN OF REORGANIZATION

This Court by its "Order Confirming Third Amended Joint Plan of Reorganization" entered April 20, 1990 confirmed a $2.3 billion plan of reorganization in this case proposed by Northeast Utilities Service Company ("NUSCO"), Public Service Company of New Hampshire ("PSNH"), the Official Committee of Unsecured Creditors, the Official Committee of Equity Security Holders, Citicorp, Consolidated Utilities & Communications, Inc. and Shearson Lehman Hutton, Inc., (collectively, the

"Proponents"), which plan had been filed by the Proponents on January 2, 1990 and was heard in a series of confirmation hearings spanning the period of April 4, 1990 to April 13, 1990.

The Confirmation Order was supported by this Court's "General Findings of Fact and Conclusions of Law Re Plan Confirmation Issues" entered also on April 20, 1990 together with various supporting Memorandum Opinions dealing with various objections to confirmation and objections to claims. The Court in dealing with the various objections in those pleadings effectively disallowed some $700 million in claims in this estate that were intertwined with objections to confirmation; dealt with a myriad of other objections including objections to the disclosure and voting procedures with acceptance of the plan of reorganization; and also denied the

objections of three common stockholders, Martin Rochman, Edward Kaufman, and Robert Richards ("RKR") contending that a Rate Agreement compromise with the State of New Hampshire embodied in the plan of reorganization was not fair and equitable and that the "best interests" requirement of Sec. 1129(a)(7) of the Bankruptcy Code was violated because the debtor could obtain greater value flowing down to the common stockholders by a litigated rate case with the State of New Hampshire.

The Court in dealing with the RKR objections made certain key findings on April 20, 1990, but due to the press of time in acting upon the pending plan of reorganization, deferred for further entry the setting forth of amplified findings and conclusions in support of the denial of these objections. This opinion therefore provides those

amplified findings and conclusions in support of the Confirming Order. The RKR objectors have been granted an appropriate extension of time, to file any notice of appeal from the Confirming Order, to a date subsequent to the entry of this Memorandum Opinion.

I. ISSUES AND RECORD

The issues raised by the RKR objections consumed most of the time during the confirmation hearings. While the record at times reads as though a utility rate case was going on before this Court it must be emphasized that notwithstanding the extensive testimony and cross-examination relating to rates, accounting methods, and ratemaking procedures, the issue before this Court raised by these objections is not what actual rate orders would be issued by the New Hampshire Public Utilities Commission ("NHPUC") if this plan were not confirmed

and a litigated rate case ensued, but rather whether the Rate Agreement embodied in the plan is a fair and equitable compromise in that regard under applicable bankruptcy reorganization case law and standards.

It also should be noted that considering the unique nature of this regulated public utility debtor, the Section 1129(a)(7) test of "best interests" is essentially the reverse side of the same "fair and equitable" issue, i.e., would common stockholders receive more net value if a chapter 7 trustee or and successor in interest conducted a litigated rate case with regard to the Seabrook investment.[1]

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[1]Technically, the Section 1129(a)(7) test would only require a showing --- which is obvious here --- that liquidation of the debtor would produce less value than a going concern reorganization under a plana However, due to the unique circumstances that no

During the course of the confirmation hearings the Proponents put on a number of expert witnesses with regard to utility operations, accounting methods, and ratemaking case procedures, to establish that the rates provided under the Rate Agreement in the plan were in fact fair and equitable in terms of what might come out of a litigated rate case. The RKR objectors put on no witnesses other than Mr. Richards himself. The case presented by the RKR

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termination of electric service to the public would be permitted in the disposition of the assets of this debtor in a chapter 7 proceeding, the Court has throughout these proceedings indicated that an alternative application of the 1129(a)(7) standard would be appropriate to protect creditors and stockholders. As stated in the Disclosure Statement "[T]he Bankruptcy Court has stated that in applying the best interests test in this case it also will compare the value achieved by the Rate Agreement with the value that might be realized by the Debtor under traditional rate-making principles in a litigated rate case if Seabrook were to operate."[Disclosure Statement, Court Doc. No. 2998, p. 70]

objectors consisted primarily of extensive cross-examination of the witnesses put forward by the Proponents in those areas in which the testimony was found to be credible and persuasive notwithstanding cross-examination. In those areas in which a substantial dispute or question remains in the record the Court will so indicate.

II. KEY FINDINGS AND CONCLUSIONS

For ease of reference beyond the foregoing incorporation by reference, this Opinion will set forth at this point the pertinent provisions of Paragraph 28 of the Confirming Order dealing with the objections to confirmation here in questions:

> Each of the Objections to Confirmation that have been filed is hereby overruled . . . . This also includes without limitation the Objections filed by the common stockholders, Martin Rochman, Edward Kaufman, and Robert Richards ("RKR"), referred to in Paragraph 69 of the General Findings and

Conclusions, contending that greater value could be realized for stockholders by a litigated rate case before the New Hampshire Public Utilities Commission as opposed to the compromise embodied in the Rate Agreement under the Plan. The credible evidence, however, supports a finding that PSNH could not recover substantially more under a traditional rate case than it would under the Plan because it is unlikely PSNH would recover significantly higher rates under a rate case. Even if PSNH were successful in obtaining higher rates, the impact of such rate hikes would likely lead to a loss of customers and loss of net revenue to PSNH, and ultimately to a lower return than that proposed under the Plan. Moreover, the expectable delay of approximately three years in obtaining the action by the NHPUC and the N.H. Supreme Court, with interest and other charges accruing to superior classes at approximately $176 million per year makes it even more unlikely that rate increases of a magnitude sufficient to overcome this "additional hurdle" to getting value down to the common could be achieved. The sum total of the evidence before the Court on this issue supports a finding---here made---that the rate increase results under the Rate Agreement represents a fair and equitable settlement and compromise well within the range of results reasonably expectable in a litigated rate case. The RKR Objection contending that a rate case would

result in more value for the Debtor than that proposed under the Plan is hereby denied for the reasons set forth above.

Likewise, for ease of reference and incorporation, the supporting Findings and Conclusions included in Section G Paragraph 60-70 of the General Findings of Fact and Conclusions of Law entered April 20, 1990, are set forth as follows:

G. 1129(a)(7)

60. Acceptance of the Plan by the impaired classes has not been unanimous. Therefore, the Plan must provide each holder of a claim or interest that has not accepted the Plan with an amount equal to or greater than the amount he, she or it would receive under chapter 7.

61. In determining the liquidation value of the Debtor, the Court will look first to the breakup value of PSNH. If the Debtor were sold in parts, the evidence in the record suggests that the value of the pieces is less than the Debtor's going concern value. As stated in the expert testimony presented by NUSCO's financial advisors, while some pieces of the Debtor might have value independent of their inclusion in an integrated electric utility, many of the Debtor's assets do not.

In addition, if multiple parties bought pieces of the Debtor it is not clear who, if anyone, would bear the responsibility to serve the PSNH customers. Because of this uncertainty, it is highly unlikely that the State would permit the Debtor to be sold in pieces. If PSNH were sold in pieces, it would bring less than what is being offered under this Plan.

62. An alternative liquidation analysis of PSNH would be the value of PSNH sold as a going concern. The liquidation value of the Debtor as a going concern is found to be no higher than the value that is proposed under this Plan. This bankruptcy has been in effect an auction of PSNH, which has been highly publicized and generated national attention and several substantial and serious bidders. Three utility companies with competent counsel and financial advisors competed actively to submit a winning plan proposal.

63. The significant publicity surrounding this bankruptcy has assured that any interested potential bidder was informed about this case. Interested bidders had many opportunities to negotiate with the Committees, the Debtor, and the State under the special procedures adopted by the Court for this unique case. The unusual problem of "valuation circularity" presented by a chapter 11 reorganization of a regulated monopoly utility company, and the special procedures employed

in this reorganization case to deal with that unique problem, have been discussed at some length in prior opinions of this Court. See, e.q., In re PSNH, 88 B.R. 521 (Bankr. D.H.H.1988); In Re PSNH, 88 B.R. 546 Bankr. D.N.H. 1988); In re psnh 99 B.R.155 (Bankr. D.N.H. 1989); In re PSNH, 99 B.R. 177 (Bankr.D.N.H. 1989); In re PSNH, 108 B.R.854 (Bankr. D.N.H. 1989).

64. The plan that ultimately succeeded in attracting the support of the Committees was the plan that offered the most value for the Debtor. A Commission of the Federal Energy Regulatory Commission has stated that this auction assured that maximum value was paid for the Debtor. Therefore, the Court finds that the liquidation value of the Debtor is no more than what has been offered for the Debtor in this Proposed Plan.

65. The Debtor would not command as high a price in a normal chapter 7 liquidation because of the value added to the Debtor by the Rate Agreement entered into with the State. This Rate Agreement provides certainty for the purchaser of the Debtor about rates than can be charged and, therefore, revenues that will be generated, without the delay and cost of litigation. A sale of the Debtor without the Rate Agreement would not command as high a price because the purchaser would discount the value of the Debtor to account for this uncertainty.

66. This Plan, therefore, provides more to the creditors than they would receive under a normal chapter 7 liquidation for the following reasons:

a. The liquidation value of the company in a chapter 7 would not be as high as it is for this chapter 11 Reorganization;

b. In a chapter 7 bankruptcy, there would be a significantly greater number and amount of unsecured creditor claims resulting from the rejection of contracts. In particular, rejection of the contracts with the small power producers alone would generate additional claims of more than $600,000,000. In addition, there would be the time element and administrative expense of a chapter 7 liquidation which would increase the administrative expenses of the bankruptcy and force the claim and interest holders to wait until the bankruptcy was concluded before receiving any dividend from the estate. Furthermore, interest on secured debt would continue to accrue.

c. In a liquidation, the Court finds that insufficient funds would be generated to pay the full amount of unsecured claims. There would be no distribution with respect to interests in a liquidation.

67. The suggestion that the State could take over the Debtor by eminent domain or otherwise, so as to preserve more value for the estate, is mere conjecture and speculation. There is no evidence that the State has any interest in taking over the Debtor. Even if the State had expressed such an interest, there is no legal authority or financing capacity for the State to take over the Debtor for a value greater than that proposed under this Plan. The New Hampshire General Court has recently passed a bill which would legislate the New Hampshire Energy Authority out of existence.

68. There is no reason whatsoever to conclude that the United State would ever take over the Debtor or Seabrook.

69. The final approach to liquidation and analysis of this decidedly unique Debtor --- wherein it or its successor or successors in no event will cease to supply electricity to customers in New Hampshire --- is to consider a non-normal liquidation scenario comparing the return to the estate under the Plan with the return the Debtor or its successors could expect to receive under a traditional ratemaking proceeding for its interest in the Seabrook plant. The Court itself during the disclosure statement hearings and proceedings insisted this alternative be set out for the consideration of creditors and

stockholders before they were called to vote upon the Plan. the objections to the confirmation filed by common stockholders Rochman, Kaufmman, and Richards ("RKR") generally raise this issue in the sense that they question the appropriateness of the Rate Agreement and compromise embodied in the Plan and argue that more value could be realized for shareholders if the Plan is denied confirmation and either the debtor-in-possession or its successors were authorized to pursue a litigated rate case before the NHPUC. This contention is considered and rejected in the confirming order entered separately this date. There is no requisite showing that the members of the impaired classes would receive more under a litigated rate case than is provided for them under the Plan. Section 1129(a)(7) therefore is satisfied under the alternative liquidation analysis approach as well.

70. The Court accordingly determines, in consideration of all the foregoing, that holders of claims or interests will receive under the Plan property with a present value not less than that they would receive under a chapter 7 liquidation of the Debtor under either a breakup value analysis, an auction sale analysis, or a rate case analysis.

III. APPLICABLE LEGAL STANDARD

The Supreme Court in 1968 set out

the basic approach for a reorganization court in evaluating a substantial compromise involved as part of the plan of reorganization in Protective Committee v. Anderson, 390 U.S> 414 (1968). the Court there reversed an order confirming a reorganization plan under chapter X of the prior Bankruptcy Act in that it found that the reorganization court had not exercised the close enough judgment and review of the proposed compromise, sufficient to reach an informed view of the fair and equitable nature of the compromise. The Supreme Court set forth the basic standard to be followed in this situation as follows:

> Compromises are "a normal part of the process of reorganization." Case v.Los Angeles Lumber Prods. Co., 308 U.S. 106, 130 (1939). In administering reorganization proceedings in an economical and practical manner it will often be wise to arrange the settlement of claims as to which there are substantial and reasonable doubts. At the same time,

however, it is essential that every important determination in reorganization proceedings receive the "informed, independent judgement" of the bankruptcy court. National Surety Co. v. Criell, 289 U.S. 426, 4236 (1933). The requirements of §§174 and 221(2) of Chapter X, 52 Stat. 891, 897, 11 U.S.C. §§574, 621(2), that plans of reorganization be both "fair and equitable," apply to compromises justa as to other aspects of reorganizations. Ashbach v. Kirtley, 289 F.2d 159 (C>A> 8th Cir. 1961); Conway v. Silesian-American Corp., 186 F.2d 201 (C.A. 2d Cir. 1950). The fact that courts do not ordinarily scrutinize the merits of compromises involved in suits between individual litigants cannot affect the duty of a bankruptcy court to determine that a proposed compromise forming part of a reorganization plan is fair and equitable. In re Chicago Rapid Transit Co., 196 F.2d 484 (C.a. 7th Cir. 1952). There can be no informed and independent judgment as to whether a proposed compromise is fair and equitable until the bankruptcy judge has apprised himself of all facts necessary for an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated. Further, the judge should form an educated estimate of the complexity, expense, and likely duration of such

> litigation, the possible difficulties of collecting on any judgment which might be obtained, and all other factors relevant to a full and fair assessment of the wisdom of the proposed compromise with the likely rewards of litigation. It is here that we must start in the present case.

When a substantial compromise is embodied in a reorganization which effectively "short-circuits" the formal provisions required for plan confirmation under chapter 11 of the Bankruptcy Code, the courts have not hesitated to apply the general requirements for evaluating compromises in reorganization proceedings as first announced in the Anderson case. See, e.g., In re Continental Investment Corp., 642 F.2d 1, 4 (1st Cir. 1981); In re Emerald Oil Company, 807 F.2d 1234, 1239 (5th Cir. 1987); In re American Reserve Corp., 841 F. 2d 159, 162 (7th Cir. 1987); In re A & C Properties, 784 F.2d 1377, 1382-1383 (9th Cir. 1986); Matter of Texas Extrusion Corp., 844 F.

1142, 1158-1159 (5th Cir. 1988); Reiss v. Hagmann, 881 F. 2d 890, 892 (10th Cir. 1989). Indeed, the policy underlying the application of this standard is so strong that it has been held to apply equally to pre-confirmation compromises presented during the course of reorganization proceedings under the Bankruptcy Code. In re Aweco, 725 F.2d 293 (5th Cir. 1984) cert. denied, 469 U.S. 880 (1984).

The Court of Appeals for the First Circuit has noted that there have to be some limits as to the degree of detail on the underlying controversy that must be examined by the trial court before considering approval of the compromise and settlement. The court of Appeals stated in Greenspun v. Bogan, 492 F. 2d 375, 381 (1st Cir. 1974 the following:

> The settlement might not be so favorable to CMI as would a final judgment on the merits. But any settlement is the result of a compromise --- each party

> surrendering something in order to prevent unprofitable litigation, and the risks and costs inherent in taking litigation to completion. A district court, in reviewing a settlement proposal, need not engage in a trial of the merits, for the purpose of settlement is precisely to avoid such a trial. See United Founders Life Ins. Co. v. consumer's National Life Ins. Col, 447 F. 2d 647 (7th Cir. 1971); Florida Trailer & Equipment Co. v. Deal, 284 F. 2d 567, 571 (5th Cir. 1960).

Bankruptcy Rule 9019 establishes the discretionary power of a bankruptcy court to approve or disapprove compromises or settlements. It has been held that in the exercise of that discretionary power it is not necessary for the bankruptcy court to decide questions of law or fact raised by objectors. In re Teltronics Services, Inc., 762 F.2d 185 (2d Cir. 1985).

The reorganization court in In re Texaco Inc., 84 B.R. 893 (Bankr. S.D.N.Y. 1988), appeal dismissed, 92 B.R. 38 (S.D.N.Y.1988) was presented with the

question of confirmation of a plan of reorganization which included within itself a compromise of a judgment claim held by a creditor, Pennzoil, in the amount of $11.3 billion for a settlement amount of $3 billion pursuant to the plan. The court approved the compromise as part of the confirmation of the plan of reorganization and noted [84 B.R. at 902] the following:

> (1) The balance between the likelihood of plaintiff's or defendants' success should the case go to trial vis a vis the concrete present and future benefits held forth by the settlement without the expense and delay of a trial and subsequent appellate procedures.
>
> (2) The prospect of complex and protracted litigation if the settlement is not approved.
>
> (3) The proportion of the class members who do not object or who affirmatively support the proposed settlement.
>
> (4) The competency and experience of counsel who support the settlement.

(5) The relative benefits to be received by individuals or groups within the class.

(6) The nature and breadth of releases to be obtained by the directors and officers as a result of the settlement.

(7) the extent to which the settlement is truly the product of "arm-length" bargaining, and not of fraud or collusion.

See Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson, 390 U.S. 414 (1968); In re W.T.Grant Co., 699 F. 2d 599 (2d Cir. 1983), cert. denied , sub nom; Casoff v. Rodman, 464 U.S.822, 104 S. Ct. 89, 78 L.Ed 2d 97 (1983).

## IV. THE SEABROOK INVESTMENT

### Construction and Cost

PSNH began construction of a nuclear power plant at Seabrook, New Hampshire after receiving a siting certificate in 1974. PSNH was the lead utility with regard to the Seabrook project,

originally holding 50 percent of ownership of the proposed plant along with a number of other joint owners compromising the major utilities in New England. PSNH's original ownership interest was reduced to 35.6 percent by various agreements and sales involving the other joint owners in the early 1980s.

The Seabrook plant was originally planned as a two-unit nuclear power plant (having two nuclear reactors) with a projected total cost of approximately $1.3 billion with completion projected for Unit I for November of 1979. On May 7, 1979 the State of New Hampshire enacted legislation (commonly referred to as the "anti-CWIP" law) which prohibited any recovery in rates for any construction costs expended by a utility in construction of a plant until such plant was actually on line producing

power commercially. [RSA § 378.30-a] Notwithstanding this development, - which in effect substantially increased the cost of completion of the Seabrook plant (due to the need to borrow money at interest to cover the cost of completion until the plant could go on line)PSNH management and the other joint owners determined to proceed with completion of the Seabrook plant.

As events turned out, only one unit of the plant was competed ad that did not occur until October of 1986. Since that date, due to various delays in getting a full operating license from the Nuclear Regulatory Commission, and the delay in these chapter 11 proceedings which were commenced on January 28, 1988, the total cost of the Seabrook plant with all carrying costs and interest charges as of January 1, 1990 is approximately $6.5

billion. Of that total investment, the amount invested by PSNH itself as a joint owner, as of January 1, 1990, was approximately $2.9 billion.

It is this greatly escalated cost of the Seabrook plant, and the ultimately inability of PSNH to borrow sufficient monies to cover its public debenture debt incurred in financing the construction of the plant until it could go on line, that led to the chapter 11 petition filed by PSNH on January 28, 1988. The NRC finally issued a full operating license on March 1, 1990, and the Seabrook plant is expected to proceed into commercial operation within the next few months. An appeal from the NRC decision is pending.

The chapter 11 filing followed by tow days a decision by the New Hampshire Supreme Court not to permit "emergency" rate increases necessary for covering

pressing PSNH public debt payments in the face of the Anti-CWIP statute. See Petition of Public Service Company of New Hampshire, 130 N.H. 265 (1988). The same escalated Seabrook plant construction and delay costs, and the question of how much of those costs would be recoverable in a litigated rate case before the New Hampshire Public Utilities Commission, is at the nub of the RKR objections to confirmation. The Confirmed Plan provides in effect for recovery of between $1.4 billion and $1.54 billion (depending on various contingencies) of the $2.9 billion that PSNH invested in the Seabrook plant.

Excess Cost Plants

It was no secret during the 1980s and before that utility companies throughout the nation were having trouble getting full recovery of their investments in "excess cost" power

plants. This development had to do primarily with regard to nuclear power plants that had precipitated unprecedented controversy and delay due to citizen groups asserting various safety and environmental concerns. Articles appeared in the professional literature regarding this novel problem for regulated utilities. Such utilities had been accustomed during the earlier decades of this century to almost automatic recovery of costs expended for new plants from the various state regulatory commissions. See e.g. Pierce, "The Regulatory Treatment of Mistakes in Retrospect: Cancel Plants in Excess Capacity", 132 U. of Pa. Law Review 497 (1984); Goldsmith, "Utility Rates and "Takings'". 10 Energy Law Journal, 241 (1989). See also, general discussion of "two tumultuous decades" for electric utility companies in an article by

Charles M. Studness, "The Electric Utilities During the 1970s and 1980s," Public Utilities Fortnightly, Vol. 125, pp. 40-47 (February 15, 1990).

The phenomenon of the "white elephant" nuclear power plant, with costs so high that utility rates to customers would have to reach unprecedented levels to recover the such costs, was not a topic restricted to professional journals. The Wall Street Journal in an Op-Ed article on October 9, 1984, entitled "Whom to Soak When Utilities Take a Bath?" led the article with a paragraph stating: "Electric utility's construction costs, mainly for nuclear plants, have mushroomed into a multi-billion dollar cloud of doom over the industry." A later lead article on October 2, 1986, on page one of the Wall Street Journal, was entitled: "'Prudency Reviews' Are Changing the Way Utilities

Set Rates: Regulators' Scrutiny Results in Big Costs Disallowances for Some Nuclear Plants."

The 1987 Write-Down

Robert M. Busch, Senior Vice President of Finance and Chief Financial Officer of Northeast Utilities,testified that the PSNH board properly wrote down Seabrook in early 1988 (for the 1987 year financial reports) and that that accounting decision was appropriate at the time. The PSNH write-down was approximately $1 billion of $2.9 billion investment. It was based essentially on the "unreasonable possibility of full recovery" of Seabrook's costs. Many other utilities had to write-down nuclear power plant costs --- even before regulators required it. The witness himself did it for NUSCO for its Seabrook share ownership two years ago. The PSNH change in accounting was shown at page 38 of its

Form 10K Report to the SEC for the 1987 calendar year.

PSNH's cost per Kilowatt ("KW") hour was 8 cents at that time. It would be 16 cents if all Seabrook costs were recovered with approximately a 89 percent one-time increase. The general rates in New England run about 7 1/2 cents on average. PSNH clearly could not charge 16 cents without suffering substantial defections by commercial and industrial users. Management realized the severe ramifications of the 1988 write-down of Seabrook on the books of PSNH. They realized that would lead the NHPUC to claim that amount as a cap in any rate litigation. But they determined that they couldn't recover more than $1.8 billion and that continuing to carry the full Seabrook costs on the books would be misleading to investors. The change was made on their general financial

statements.

PSNH did not change the Form 1 (the so-called "regulatory books" submitted to various regulatory agencies) because they wanted to preserve higher value for Seabrook power if that power became more valuable in the future (for example, if oil prices escalated again) and higher value also contingent upon the appeal then pending in U.S. Supreme Court. The Form 1 is filed with FERC as well as with NHPUC.

Bruce W. Wiggett is the comptroller of Public Service Company of New Hampshire. Wiggett testified that Assistant Attorney General Larry M. Smuckler (now Chairman of the NHPUC) stated during the negotiations on the plan of reorganization that PSNH would never recover more than the $1.8 billion that management had indicated was recoverable.

The Examiner appointed by the Court in this proceeding, Paul L. Gioia, who served as Chairman of the New York State Public Service Commission during most of the 1980s, also indicated that the fact of the 1987 write-down would be given serious weight in a regulatory proceeding as to the upper limits of cost recoveries even though the write-down would not be legally binding upon a regulatory commission.

Andrew B. Herf is a partner in the Accounting and Auditing Group of Arthur Andersen and Company. He has worked for that company for about 20 years. His specialty is the public utility area. Herf testified at length about the 1987 write-down by PSNH management. [See Transcript, Court Doc, No. 3722, pp. 246-269] He noted that PSNH in its 1987 write-down eliminated equity items and replaced "regulatory interest" with

"commercial interest." This amounted to an approximate $1 billion reduction to a $1.8 billion asset value for Seabrook. To Herf, the fact that management did not continue to capitalize interest after the write-down (although they had done so before and could have continued to do so under accepted accounting principles) meant that management felt that the $1.8 billion was a ceiling. Herf testified that one reason management could know in 1988 that they couldn't get the other $1 billion out of Seabrook was simply that Seabrook at a $6,000 to $7000 KW capacity cost was not economic when compared to capacity costs of other plants running in the $2000 to $3000 per KW range. Herf testified that if that were true in 1987, its is even more true today with a more

intense competitive environment.[2] Under the plan the KW capacity cost would be approximately $3,500.

## V. THE PLAN/COMPROMISE

### The Plan Auction

Robert M. Spann is a senior consultant for Charles River Associates, an economic and management consulting firm with offices in Boston and Washington, D.C., as well as a lecturer in economics at George Washington University. His area of expertise is regulatory economics and finance and high thrust economics and statistics. He has a B.S., a Masters, and an Ph.D in economics

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[2] At the conclusion of the Disclosure Statement process in November of 1988, the court required the debtor to indicate the maximum it would seek in a litigated rate case --- for disclosure purposes on the range of results regarding the compromise --- and Mr. Levin for the debtor stated in open court that the company would not seek more than $1.8 billion in recovery of Seabrook costs in a litigated rate case.

from North Carolina State University. Spann testified that in view of the "auction" of PSNH which occurred during the course of these reorganization proceedings, by virtue of the multiple competing plans filed, if the company were worth more "with the rate case to go forward" another buyer would have come in and offered more under "market" conditions.

John F. Curley is managing director in the Merchant Banking Department of Morgan Stanley, an investment banking firm. He has worked with that company since 1978. He has a B.A. and MBA from Dartmouth College. Curley testified that the NUSCO plan offered the highest value available in view of the fully publicized auction process over a clearly sufficient time period of two years to attract market interest and in view of the fact that four legitimate bidders (all being

substantial regional utility companies) did enter the bidding process.

The Plan Compromises

Seabrook is valued in the plan at $700 million, plus an "acquisition premium" of another $700 million, for a total $1.4 billion in Seabrook value. The calculations with regard to value according to Curley are $2.3 billion in plan value, comprised of $900 million for assets other than Seabrook and $1.4 billion of Seabrook costs to be recovered. The Seabrook recovery however could be up to $1.54 billion depending on other variables and contingencies. The Rate Agreement, which includes the Seabrook recovery, was negotiated constantly up to the final NUSCO plan being joined in by the committees. There was no agreement on rates before a plan agreed to by the major parties was presented.

Curley testified at length as to the $2.3 billion in values intended to be realized under the NUSCO plan. He also testified as to the step 1 and step 2 implementation procedures with regard to the plan. Under the plan, NUSCO would need to raise an initial $458 million in cash on the effective date and has $300 million of that already committed. A total of $1.357 billion to $1.457 billion will ultimately be required to fund all cash payments under the plan.

Morgan Stanley is "highly confident" that it can sell the securities on the rates and terms indicated to fund the plan under both steps. It has given a letter to that effect. The Rate Agreement is essential to confidence in the markets to purchase the securities according to Curley. It is critical in that regard that the seven years of fixed rate path and three years of additional stability

in rates under the Rate Agreement be available for marketing the securities. Moreover, the return on equity "collar" included in the Rate Agreement gives additional comfort in that no one can predict everything that may occur over 10 years and the collar, in effect, protects against items that might have been missed in the projections for all sides.

Curley also testified at length as to feasibility and performance by the reorganized debtor under the plan, including the strong management regarding nuclear plants and the excess winter-time capacity and other synergies that NUSCO "brings to the table" as additional value under the plan.[3] He testified that the

[3]NUSCO'S peak load, due primarily to air conditioning, occurs in the summer; the peak load of New Hampshire, due primarily to skiing, occurs in the winter. This Court rejoices in being on the right side of <u>that</u> particular synergy.

value attributable to the equity holders, Classes 11, 12 and 13, would range from $170 million to $500 million depending on various contingencies. He testified further that both the Official Committees and the State of New Hampshire wanted to litigate the rate case initially but finally decided that a negotiated rate agreement was in the common interest. Curley was actively engaged in the negotiations for NUSCO.

Wilber L. Ross, Jr. is employed by Rothschild Inc. He has been involved in many large bankruptcy reorganization cases in the United States as a financial advisor to a major party in interest. He has a B.A. from Yale University and an MBA from Harvard University. Ross testified for NUSCO regarding the difficulty in the negotiations that led to the consensual plan. Ross was the investment banker retained by the Equity

Committee. Essentially, the negotiations ultimately resolved down to "give-ups" by various senior interests to let value go down to the equity holders. These items included $218 million in post-petition interest claims given up by the unsecured creditors and $145 million of pre-petition dividends and $99 million of post-petition dividends by the preferred shareholders. The Equity Committee was the principal party threatening a litigated rate case in the negotiations.

Price Paths/Charts

Peter Fox-Penner is the Vice President of Charles River Associate. He has a B.A. in electrical engineering from the University of Illinois, a Master's in mechanical engineering from the University of Illinois, and a PhD in economics from the University of Chicago. His doctoral dissertation, and other post-graduate publications have concerned

electric utility regulation. His specialty at Charles River Associates is electrical utility matters. His clients are national in scale. He testified as to the calculations on a "price path" and an "equilibrium price path." The latter concept examines a sequence of prices over time to include consistency in price/revenue planning in terms of actual revenues to be collected.

Penner prepared and identified the two charts (NUSCO Exhibits 8 and 9) which illustrate the range of utility rates in New England with a black line on Exhibit 8 representing the price path under the reorganization plan. The black line is in the red band (the top 20 percent of the chart) until 1997. The plan prices therefore are higher than the prices charged to 80 to 90 percent of all other electric power customers in New England. [Transcript, Court Document No. 3672, p.

176] The price path on the chart does take into account expected losses to self-generation, fuel switching, and the resulting lower use of electricity.

The second (broken) line on Exhibit 9 shows RKR's idea of a maximum "constitutional rate path" in the view of witness Spann. This shows 18-cent to 19-cent rates as opposed to a New England average of 7 1/2 cents. Actually, RKR rates would be 16 to 17 cents but the witness assumed loss of sales from the high rates so raised the rates necessary to actually collect the entire $2.9 billion of Seabrook costs.[1] The chart does not consider municipalization dangers.

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[1]The RKR objectors argue that they would use a long-term "phase-in" of the Seabrook higher recovery and could ameliorate the indicated rate shock. However, this long-term proposal encounters significant other problems discussed below.

The top of the red band on chart Exhibit 8 is not the breakpoint which would cause a death spiral of ever increasing defections from the system prompting still higher rates causing further defections. Rates could go appreciably higher if allowed by the NHPUC. When rates do go too high, the "death spiral" means that you not only lose the increased rates, but all rates from customers who go off the system.

Phase-In Approaches/Limits

In Spann's view "phase-in" approaches, while amelicrating the "rate shock" impact by allowing lower initial rates for A Seabrook recovery, just mean that "you collect larger dollars later rather than now." Spann testified that "phase-ins" have benefits and costs, i.e., there is no such thing as free lunch.

Full Seabrook Recovery

Busch testified there is no reasonable way that the $2.9 billion cost of Seabrook could be put into a rate base in view of competitive pressures and other economic considerations. A phase-in would ultimately require more than $2.9 billion in recovery. Spann testified that if you tried for a $2.9 billion recovery over 10 years, you would probably start at about 13 cents early on but by mid-decade rates would go over the line and above 20 cents. This assumes the 10-year maximum phase-in period that accountants require. PSNH at the time of the 1987 write-down of Seabrook estimated a one-time rate increase of 130 percent would be necessary for recovering Seabrook costs. That increase currently is estimated at 89 percent. The drop from 130 percent to 89 percent regarding the increase to recover Seabrook costs was related, among other things, to lower

fuel oil costs under current market conditions; the fact that the cost of equity variable dropped significantly during the time period after 1987; and that the net revenues were up and other asset values fluctuated.

One-Time 31 Percent Increase

The RKR objectors rely heavily on the reference in the Disclosure Statement (p.73) to the Bower-Rohr Study (Bower Rohr & Associates) commissioned by the debtor in early 1989 stating that a one time rate increase of 31 percent, plus yearly inflation increases thereafter, would be affordable. The reference indicates that the "normal" rate increase discussed would be an average and assumes the actual increases would vary among customers classes.[2] Rates now charged

[2]There is no indication in this record as to how such increases would vary, i.e., how or whether existing "rate design" practices of the NHPUC would be

are approximately 9 cents per KW hour.

An increase of 31 percent the first year and then increases with inflation assumed to be 4 percent per year would result in high rates existing nowhere in New England except on "island" or "peninsulas" having special requirements. The prices would be 12 cents at the outset. Wiggett recognized the Bower-Rohr study indicated a 31 percent rate increase would be bearable, but he expressed the opinion it was not feasible due to economic and political realities and the uncertainties as to the actual effects of such an increase. The Business and Industry Association for one would react to such an increase as "absurd" and has indicated that more than a five percent increase in rates will induce industry to leave New Hampshire.

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changed.

The Bower-Rohr Report discussion of a rate increase of 31 percent is before the court only in terms of the brie discussion of the Report that is included in the Disclosure Statement. The report is not in evidence before the court nor were witnesses called by the RKR objectors to testify directly as to the conclusions reached.[3]

Off-Load Danger

David E. Kleinschmidt is a senior consultant in the Engineering Science of Arthur D. Little, an international planning and technology consulting company. He has worked for this company since 1976, and specializes in utility and power generation technology. He has

[3]The Bower-Rohr 31 percent reference in the Disclosure Statement is a fact but was put there by Court direction only to alert equity holders to the alternative arguments as to bearable rates. It was there for voting purposes only. It is not independent evidence that such rates would be collectable.

a B.A. in chemical engineering from MIT, and a Master's from MIT. He has particular expertise with regard to power-generation, co-generation, and self-generation matters.

Kleinschmidt conducted a survey and interviews with substantial commercial user candidates during the period between November 1988 and January 1989 with a follow-up in March of 1990. They involved some seventeen likely candidates for going off the system.

Kleinschmidt testified at length as to his study; ran a model with a ten-year simulation; discussed generation systems "easily purchased"; and the marketing effects going on in New Hampshire currently in that regard. He testified that significant self-generation is already occurring in New Hampshire and that it would be a serious threat with greatly increased electric

rates.

Kleinschmidt testified further as to other factors involved and noted that the perception of where electric rates are going is very important --- more so than the actual current rates. From his survey, he noted that companies who are likely candidates for self-generation or co-generation are largely aware of the reorganization case and are waiting to see what happens. He found that they have already crossed the "psychological barrier" and so would be ready to decide on self-generation rapidly and implement the same in the face of substantial rate changes.

Kleinschmidt testified that the loss of demand over 10 years due to the increased rates would be approximately 45 MGW; or in other terms lost sales of 280,000 MGW hours per year. This translates to a loss of 1 1/2 years of

growth. He testified that the large commercial customers were the most likely to go off the system and that you would not only lose their revenues but those customers typically cost less to service so you have a doubly negative economic effect. Presently, there is some 50 MGW in capacity by co-generation of industrial customers of PSNH. There is at least that much capacity in self-generation and considerably more if waste-to-energy plants are included.

The Examiner's questions to Kleinschmidt suggested that changes in "rate design" (i.e. reducing the higher, subsidizing rates typically charged industrial customers) could cut down the off-load danger of higher rates. The witness did not think the off-load danger here could be covered by that device. Moreover, disturbing the rate design subsidy pattern would probably provoke a

violent legislative reaction.[4]

Curley also testified, with regard to the off-load danger, that you don"t lump all customers in this type of analysis, since you would lose the most profitable customers and also lose the more dense load as well.

Municipalization

William G. Moss is Vice President of the Energy Group at Charles River Associates, where he has been employed for six years. He specializes in microeconomic, statistics and econometrics with a focus on energy and other regulated industries. He has a B.A. and Ph.D in economics from the University

[4]It is noteworthy that in the recent "PSNH legislation" concerning the Rate Agreement that the New Hampshire legislature took special care to forbid any altering of rate design by the reorganization company without approval by the legislature itself. See N.H.R.S.A. 362-C:8 (December 18, 1989), which is attached as Exhibit G to the Disclosure Statement.

of California at Berkeley.

Moss has studied municipalization attempts during 1970-1989 and found 79 such attempts. He concluded it was a viable option in New Hampshire but probably would not occur under the NUSCO plan. It would probably occur at a 1 1/2 to 2 cent per KW hour increase.

Of the 79 municipalization attempts that Moss studied, 20 resulted in municipalization and 23 are still pending. Of the 20 that succeeded, they tended to involve small municipalities of up to 10,000 customers. However, major municipalization attempts are pending with regard to New Orleans and Chicago.

Wiggett, the controller of PSNH, testified regarding the studies done in Nashua, New Hampshire in 1987 and 1988 considering possible municipalization. The city put the matter on hold pending the bankruptcy resolution. The third

broken line on chart Exhibit 9 shows the effects of a hypothetical municipalization of Nashua, New Hampshire. The rates literally "go off the chart" under that scenario. The resulting twenty cent rates would mean PSNH would suffer a serious loss of its most profitable business.

On cross-examination, Wiggett admitted that gain from a sale of utility property due to a municipalization would go to the bottom line for investors but "in the long run it would not be good because the company would be losing revenue from a lot of customers."

Transmission Access

Penner testified that you can't effectively charge more than costs for a transmission access because of NHPUC and FERC regulatory policies fostering competition. A newly-formed utility company serving Concord and Exeter, New

Hampshire, in fact did recently go off the PSNH system and forced PSNH to run other purchased power through PSNH's lines at cost after a proceeding before the NHPUC.

## VI. LITIGATED RATE CASE

### Commission Ratemaking/Process

During the course of the hearings the Court requested that the State of New Hampshire file a non-adversarial memorandum of exposition setting forth the basic procedures and principles with regard to ratemaking and rate cases under New Hampshire law. That memorandum, filed April 11, 1990 as Court Document No. 3572, with certain non-material deletions, is excerpted and attached as an Annex to this Opinion. The Court also received a Supplemental Report from the Examiner on this matter, filed April 6, 1990, as Court Document No. 3455. As noted above, the Examiner himself has

served as Chairman of a major state public utility commission. The following extracts from the Examiner's Supplemental Report, which extracts I deem to be non-adversarial in this context, are useful in setting forth the general principles and procedures relating to ratemaking for regulated monopoly public utility companies:

> For ratemaking purpose, a utility's costs are broken down into two basic types, operating expenses and capital costs. An operating expense is generally defined as a good or service which will be consumed by the utility within one year. These include costs such as fuel, labor, insurance and taxes. While not readily apparent, depreciation is included as an operating expense since it represents one year of economic wear and tear on the utility's equipment.
>
> Capital costs are the costs associated with financing the utility's investment in assets that provide service to the public. The "rate base" is made up of utility assets that will provide service for more than one year. The value of these assets

is generally calculated on the basis of prudent original cost less depreciation, and is limited to assets that have been financed by funds provided by utility investors and not other sources (such as customer deposits or tax benefits).

Once the rate base has been established, the PUC must determine the "rate of return" that the utility should earn on the rate base. The cost of debt securities is relatively easy to determine since they usually carry a fixed rate of interest. The same is generally true for preferred stock. The cost of common equity invested in the utility, however, is more difficult to ascertain, since for most utilities the return demanded by common stockholders is determined by the financial market and is constantly changing.

* * *

The ratemaking process may be expressed as a simple formula: "R = O + (B x r), where R is the utility's allowed revenue requirement; O is its allowed operating expense; B is its rate base, defined as cost less depreciation of the utility's property that is used and useful in the public service, . . . and r is the rate of return allowed on the rate base." Appeal of Conservation Law Foundation of

New England, inc., 127 N.H. 606, 633-34, 507 A.2d 652 (1986) (citations omitted).

* * *

A PUC usually operates pursuant to a broad statutory authorization with a general mandate to establish "just and reasonable" rates [see RSA 374:2; 378.] without specific direction as to how that is to be accomplished. PUCs normally adopt extensive rules and regulations, within the broad framework of their statutory authorization, that govern their regulation of utilities. PUCs also develop policies with respect to specific issues relating to utility regulation. The regulations and policies adopted by a PUC are subject to change whenever the PUC concludes that the public interest so requires.

In the early days of utility regulation, legislatures set rates for utilities, including railroads and early gas and electric companies. That approach proved unsatisfactory for many reasons, including the perception that utilities had gained undue influence through the lobbying of legislator and that the legislative process is not well-suited for dealing with the complex issues related to utility regulation.

The rate setting process is often referred to as a

> legislative function, reflecting the fact that it was originally exercised by legislatures before being delegated to PUCs. The rate setting function is also referred to as legislative, as distinguished from judicial, to indicate that PUCs have broad discretion and, unlike judicial officers, are not disinterested arbiters between contesting parties, but represent the public and have a direct responsibility to protect the public interest in safe and adequate service.
>
> Ratesetting, however, is also referred to as 'quasi-judicial", which reflects the fact that PUCs' administrative proceedings have become relatively formal and parties who appear before them are expected to be accorded a fair hearing and reasonable treatment. Furthermore, PUC ratesetting decisions must be based on the record developed in a proceeding, and are subject to judicial review. Judicial review, however, is limited and the courts are required to respect the broad discretion and expertise of the PUC.

The record includes considerable discussion as to why we have regulatory commissions with regard to electric power companies and regarding the "legislative

nature" of the NHPUC as one aspect of its activities. Busch testified that commissions were created not simply to insulate from political pressures, but primarily because the subject was "too arcane" for the legislature to deal with. He agreed that utility regulators have great flexibility but noted that they still have to exercise that discretion on a record and not arbitrarily. Busch testified that regulatory discretion is always a risk but there is more risk "if 420 legislator are doing it."

Curley testified that there are "tons of subsidies" (also expressed as a "plate of spaghetti") in the way utilities are regulated by PUCs, i.e. the PUC tends to allow "the farmer at the end of the line" to get electricity at affordable costs by in effect requiring other customers to subsidize some of that

cost. PUCs simply would not allow dumping of all of the costs of the customers that go off the system upon the "little people" who have to take electricity no matter what it costs.

Wiggett has been involved in many NHPUC proceedings and testified emphatically that the process is not a simple equation with the "four factors" set forth in the literature. The company has the burden and must put on persuasive evidence; competition is a factor; and the company "cannot price itself out of the market."

Herf testified that you cannot predict exactly what PSNH would get in a rate case but that the $2.3 billion company value under the plan is within the reasonable range of outcomes of a contested rate case. Herf also testified that the rate arena and the regulatory-political environment the utility is in

has to be considered with regard to rate cases and rate levels.

Return on Equity

Busch testified regarding how return on equity is determined, including a discussion of "forcing shareholders to sell stock below book value." Richards cross-examined Spann at length regarding the debt-equity ratio testimony and cost and return on equity calculations, etc. The return on equity level for PSNH in 1986-87 pursuant to PUC orders was 15 percent. Wiggett agreed with Richards' point that return on equity can be defined as the return that must be paid to induce common stockholders to buy stock at a price above book value. The concept of "dilution" therefore means selling shares below book value. Wiggett testified however that "dilution" was not a factor in any rate case with which he has been involved. Herf testified that

there are many, many way to calculate return on equity.[5]

Seabrook Rate Case/Delay

Seabrook is the most expensive nuclear plant ever built, for its

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[5] A leading treatise echoes this thought and the "circular question" problem that has been endemic to this reorganization case: "The most difficult problem in determining the overall cost of capital arises in estimating the cost of equity capital. The relevant question is: How much must a utility earn to induce investors to hold and to continue to buy common stock? In answering this question, it is important to realize that circular reasoning is involved. In the absence of a fixed, expressed, or implied commitment as to the dividend rate, the actual cost of floating a stock issue is indeterminate. Investors' decisions are largely based on a utility's expected earnings and upon their stability, as well as upon alternative uses of investment funds. Yet, since the allowable amount of earnings is the object of a rate case, a commission's decision, in turn, will affect investors' decisions." Phillips, The Regulations of Public Utilities, p. 375, Pub. Util. Reports, Inc. (1988( Cf. also the "Between Scylla and Charybdis" reference by Justice Holmes in Cedar Rapids Gas & Light Co. v. Cedar Rapids, 223 U.S. 655, 669 (1912).

capacity, and probably would result in a write-off of 50 to 60 percent in a litigated rate case, according to the testimony of witness Spann. He also testified that PUCs nationally are requiring a "performance clause" even when nuclear power plants are allowed into rate base. The objective is to be able to suspend cost recovery when, as often is the case, the plants are not operating due to various problems. If the NHPUC required this in a Seabrook rate order, even assuming the higher recovery in a litigated rate case under the RKR assumptions, the company would be back in the bankruptcy court when Seabrook had its first operational problem, although it purportedly would have a right to recover all its Seabrook costs. It was obvious according to Spann that if Seabrook costs two to three times more than any other plant the PUC would

look at that as a factor in determining rates.

Ross calculated $2.68 billion in claims ahead of the common stockholders in the absence of a consensual plan as of the time of the confirmation hearings. Accordingly, if the plan is not confirmed, the litigated rate case would have to produce $2.68 billion in total company value, plus $176 million per year until a new plan could be confirmed before distributions made under a new plan could reach down to common stockholders after covering the full rights of the senior classes. The $176 million a year is comprised of $135 million per year accruing on post-petition interest on the unsecured claims and $41 million per year on post-petition dividends to the preferred shareholders.

Wiggett testified that he didn't believe that the company would get the

full $1.8 billion from the PUC; he estimated that it was more probable that it would get $1.4 billion to $1.5 billion. PSNH in a rate case would seek return on equity that would attract stock investors at a price above book value.

There would be negotiations in a rate case with regard to future Seabrook operational contingencies even apart from the items regarding recovery of the costs of Seabrook. The negotiated rate plan has protections with regard to those future contingencies.

Robert C. Richards is an attorney and also holds PSNH common stock. He acted as attorney for the RKR objectors and also testified himself at the hearings. Richards was an attorney for the Long Island Lighting Company from 1971 to 1984. From 1984 to 1989 he was a member of the Strategic Planning Department and the Financial Planning

Department of LILCO during the time of construction of the troubled Shoreham nuclear power plant on Long Island. He has a B.A in math from Yale University, a J.D. from Harvard University and an MBA form New York University.

Richards testified that he believed that the company could get "much greater value" because of the New Hampshire law regarding recovering prudent investments; that the Bower-Rohr Report indicating a 31 percent increase plus inflation thereafter would be bearable should have been relied upon; and that alternatively PSNH could charge the NUSCO plan rates then continue thereafter with inflation for greater value. He argued that almost no burden has been imposed upon ratepayers under the new NUSCO plan since no rate increases occurred during the chapter 11 in 1988-1989 and that rate levels will go down after 2000 A.D. under

his analysis. He feels this is unfair. He testified that the rates in 20001 and after would be less than the New England regional average.

Richards' basic argument revolves around his question of "who should pay for what the politicians in Massachusetts and New Hampshire did to PSNH?" He refers to the anti-CWIP law that drove up costs and was "a bet" that Seabrook would not run; that the investors won that bet so they should get the recovery regardless of the $6000 to $70000 KW capacity cost; and that the big cost in Seabrook was the interest cost and delay cost that should not have happened.[6]

Richards testified generally to these matters at the April 12, 1990 hearing. [Transcript, Court Document No.

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[6]It is true that $1.6 billion of the total $2.9 billion of PSNH's Seabrook cost is comprised of carrying charges.

3739, pp. 43-80, 202-210]

Effects of RKR Proposal

The RKR proposal assumes, according to witness Spann, $2.5 billion worth of debt. Spann here was dealing with the RKR alternative of a 31 percent initial increase followed by 4 percent per year after that. [Transcript, Court Document No. 3688, pp. 86-89] This would be 70 percent of the $3.6 billion value ascribed to the company under that proposal. This debt-equity ratio would be much higher than all but 4.7 percent of publicly-held companies of all types reported in the leading statistical publication. It is unheard of for a utility company.

The $2.5 billion debt instead of $1.6 billion debt under the plan would mean 50 percent higher fixed debt service costs. If the debt were only backed by Seabrook the reorganized company would

have to pay higher interest costs according to Spann. The company would have a "razor-thin margin" if anything went wrong and would very likely be right back in the bankruptcy court if that occurred. Spann noted recent experiences with the Boston Edison Nuclear Power Plant involving considerable down-time of that plant. Spann expressed the view that the debt required under the RKR proposal would in effect be "contingent notes on the Seabrook performance for 20 years." Seabrook income uninterrupted would be essential to servicing a $2.5 billion debt for the reorganized company. The market would react accordingly so that even if the RKR rates were obtained from the NHPUC the debtor still would not realized the greater value due to the 70 percent debt-equity ratio.

Richards' admitted that his proposal would not satisfy currently applicable

accounting guidelines. He referred to his formula as "a phase-in to last for the entire life of the asset" referring to the projected 39 year expected life span of the Seabrook plant. Richards also admitted that his "present worth to annuity" concept and formula has not actually been used in any ratemaking case so far.

Questions by the Examiner brought out that the real impact of the depreciation and cost recovery approach put forth by Richards is in the later years, beyond the 10 year period testified to by Richards, and that you would really need to extend the projections considerably to see the actual effects of that proposal. There would be a very large deferred account that would have to be amortized in the future. [Transcript, Court Document No. 3739, pp. 121-125]

The RKR proposal also ignores the fact that stock investors look at net income and dividends and gives no real consideration to what happens to utility stock if the utility quits paying dividends because there are no retained earnings. The fact is the market price for the shares would drop. [Transcript, Court Document No. 3739, pp. 131-135]

Richards was asked how the company would finance new debt borrowings for ordinary operating purposes if it was showing losses or low earnings on its books until ultimately recovering through high rates in the future. Richards' response was that analysts would see big increases in rates coming and the company would be in good shape in a few years, i.e. there would be good cash flow but no earnings. [Transcript, Court Document No. 3739, pp. 191-192] As indicated above, however, this has never

been actually accomplished in real world market conditions. Generally, the RKR objector' contentions were presented as part of a highly theoretical construct. [Transcript, Court Document No. 3739, pp. 156-179]

GAAP/FASB Accounting

In reporting the value of its investment in Seabrook PSNH was bound by Generally Accepted Accounting Principles ("G.A.A.P."). Historically PSNH had accounted for Seabrook in accordance with Financial Accounting Standard No. 71 ("FAS-71"), promulgated by the Financial Accounting Standards Board ("FASB"), which sets forth the accounting principles and rules for regulated utilities. When a power plant is accounted for under FAS-71, the plant construction costs and an allowance for funds used during construction ("AFUDC"), which represents a reasonable return on

both the debt and equity invested into the project, are added into the cost of the asset and capitalized on the utility's balance sheet. The premise for adding in AFUDC is the expectation that it will be recovered when the power plant goes into service. The standards for FAS-71 accounting require a utility to be: (1) subject to ratemaking by an independent regulatory body; (2) with ratemaking done on the basis of cost; (3) by a regulatory commission that is able to set rates than can be both billed and collected.

If a utility determines it no longer meets the criteria for FAS-71 accounting it must cease FAS-71 accounting for an asset and switch to traditional accounting analysis. When PSNH ceased FAS-71 accounting for Seabrook it reaccounted for the entire asset under traditional commercial accounting

methods. PSNH removed all AFUDC from its valuation of Seabrook and replace it with capitalized interest.

Under FAS-71 the company had to reverse its accounting for Seabrook in 1987, according to Wiggett, since PSNH could not recover the cost of seabrook at rates that were collectable. FAS-71 also restricts any "phase-in" to require that those deferred costs must be recovered within 10 years. If the company can't recover them in 10 years, it has to write the value down and "you can't carry it as an asset." If a company goes off FAS-71 then it can no longer capitalize return on equity but it could continue to capitalize debt return i.e. interest.

The Financial Accounting Standards Board was created because "the SEC never did it" according to witness Herf. These are independent accounting experts who are supposed to provide a "due process

procedure" before promulgating their accounting guidelines. The SEC adopts the FASB rules for registrants under their jurisdiction. There would also be ethical rule problems regarding a "clean statement" by a CPA auditing firm, if FASB guidelines were not met, pursuant to rules of the American Institute of Certified Public Accountants. A public company realistically needs such a CPA statement in order to sell securities. In the mid-1980s the FASB entity was concerned with the fact that "regulators were designing rate plans that pushed off cost recovery long into the future." Some utilities tried such schemes before the FASB promulgation but they went back to the PUCs to get rid of them primarily because of Wall Street concerns rather than GAAP.

Herf testified that underwriters put heavy pressure on management to use GAAP.

Herf further testified that all "sinking fund" devices make accountants nervous because the later year costs are usually higher and you have less years to recover those costs. With a nuclear power plant you commonly also have retrofitting expenses, and other unanticipated operational expenses, so you don't smooth out the costs as anticipated under a sinking fund device in actuality.

The utility industry fought the 10-year rule in the FASB hearings vigorously, but FASB concluded that "if you can't get it done in 10 years" the utility has substantial uncertainty regarding recoverability.

The RKR unconventional depreciation and cost recovery proposal would not be allowed under GAAP. Wiggett recognized the existence of unconventional theories regarding recovering of greater costs over a longer time --- or other

accounting approaches to depreciation involving excess costs plants --- but that such theories were not realistic because the SEC in effect would freeze securities sales if such non-GAAP devices were employed. In his and Herf's view, as a practical matter, a company cannot be a public entity without GAAP accounting.[7]

Other Seabrook Recoveries

Busch testified at length regarding UI's recovering of 57 percent of Seabrook --- indicating it was actually more because of recovery of construction costs

[7]Herf emphasized that uniquely in the regulated utility environment "you can drive revenue requirements by depreciation" and that this could have significant back-loading effects that is the basic reason for rejecting novel "economic depreciation" methods for such companies. Herf testified in great detail regarding GAAP and FASB accounting matters at the April 11, 1990 hearing. [Transcript, Court Document No. 3722, pp. 144-188, 194-205, 209-226]

during construction. With regard to the Millstone Plant in Connecticut, NUSCO wrote off $110 million originally but the PUC ultimately forced a settlement involving a $400 million writeoff. The Examiner points out that the larger the dollar figures involved in an excess cost plant the higher the percentage write-down will be and that PSNH had a larger share of Seabrook than UI or NUSCO. He notes that on a more appropriate KW capacity cost basis, in a survey of allowed nuclear power plant recoveries, the PSNH recovery under the plan is within the range of other recoveries.

Other Nuclear Plant Recoveries

There are no actual write-offs of 50 percent or more in recovery of nuclear power plant costs. Herf testified that he has studied nuclear plants having high costs of $4,000 KW capacity costs or over and having 900 MGW or over in size, and

found nine plants in that category. However, he indicates there are a whole host of variables in that you cannot really predict from these cases the possible Seabrook write-down in a regulatory proceeding.

## VII GENERAL CONCLUSION

The objections to confirmation by the RKR objectors on the basis that significantly greater rates and enterprise value could be obtained for the company by a litigated rate case, as opposed to the results obtained under the Rate Agreement embodied in the Plan of Reorganization, boil down to two essential points: (1) that except for a very small portion PSNH's expenditures in completing the Seabrook plant were all prudently incurred and therefore would justify and require NHPUC approval of full recovery of such prudently incurred costs under applicable statutory and

constitutional requirements; and (2) that PSNH could ameliorate the "rate shock" effect of full recovery of such costs by employing a "phase-in" recovery together with recovery well beyond the 10-year period applicable under currently accepted accounting standards by the use of some imaginative though unconventional deferred costs recovery mechanisms.

With regard to the prudent investment recovery point, the objectors see this principle as a fixed star governing what the regulatory agency can do with regard to the recovery of costs associated with the Seabrook nuclear power plant, and argue further that the requirement is of constitutional dimension. The Supreme Court of the United States however has expressly declined to adopt prudent investment recovery as a constitutional standard. Duquesne Light Co. v. Barasch, 109 S.Ct.

609, 619-20 (1989). The auction which all courts have exhibited in avoiding an exclusive focus on prudent investment as a cost recovery standard stems from the desire to avoid an unwarranted incentive for over capacity generation by public utilities. See Pierce, "The Regulatory Treatment of Mistakes in Retrospect: Canceled Plants and Excess Capacity", 132 U. of Pa. Law Review 497 (1984).

New Hampshire itself, in its statutory and regulatory framework, has both the "prudent" and a "used and useful" standard in this regard, undergirded by the ultimate "just and reasonable rates" statutory language provided in NH RSA 378:7. This legal framework for regulatory action is a far cry from the simplistic "prudence only" position put forward by the objectors. It obviously implies a balancing to cover both the initial analysis at the

beginning of the plant construction as well as the ultimate effect of the plant coming on line at a particular time and at a particular cost.

The New Hampshire PUC and the New Hampshire Supreme Court gave ample warnings to PSNH in this regard in various ruling issued during the course of the Seabrook plant financing and construction. See, e.g., Petition of Public Service Co. of New Hampshire, 130 N.H. 265 (N.H. 1988); Appeal of Public Service Co. of New Hampshire, 130 N.H. 748 (N.H. 1988);Re Public Service Co. of New Hampshire, 70 N.H.P.U.C. 886, 904 (1985):Re Public Service Co. of New Hampshire 68 N.H.P.U.C 668, 670 (1983); Re Public Service Co. of New Hampshire, 67 N.H.P.U.C. 223, 231-2 (1982): Re Public Service Co. of New Hampshire, 67 N.H.P.U.C. 490, 525 (1982); Re Public Service Co. of New Hampshire, 65

N.H.P.U.C. 492, 493 (1980).

The New Hampshire Public Utilities Commission said clearly and unmistakedly in 1985 in Re Public Service Co. of New Hampshire, 66 PUR 4th 349, 70 NHPUC 164, 246, 247 (1985):

> If in a subsequent rate proceeding it is found that part of the capital investment in Seabrook I is imprudent so as to cause excessive and burdensome rates not economically justified, the Commission may disallow part of the Seabrook investment.
>
> * * *
>
> While there are constitutional guarantees of the opportunity to earn a fair return, rates may not be "prohibitive, exorbitant, or unduly burdensome to the public." (262 U.S. at p. 290, footnote 2, PUR1923C at p.201, footnote 2.) The essential reconciliation of prudent investment and reasonable, not unduly burdensome rates may be accomplished in a rate proceeding when PSNH seeks rate support for the addition of Seabrook to its rate base. A prudency investigation should be initiated by the Commission on a timely basis to assure an in-depth analysis of prudent investment and the reasonable rate level for a fair return to

investors without unduly burdening ratepayers.

Similarly, in Appeal of Public Service of New Hampshire, 122 N.H. 1062, 1076 (N.H. 1982) the New Hampshire Supreme Court stated:

> Thus, while management in the first instance may be free generally to make its own decision about its level of investment in new construction, see Appeal of Legislative Utility Consumers' Council, 120 N.H. 173, 175, 412 A. 2d 738, 739 (1980), it must bear in mind that as a regulated company not all costs may be recovered from the public when the plant is completed.
>
> A vested right to build is not a vested right to have customers pay. PSNH itself agrees that the PUC may reject management decisions "[w]hen inefficiency, improvidence, economic waste, abuse of discretion, or action inimical to the public interest are shown." Re Public Service Company Util. Consumers' Council v. Public Util. Com., 117 N.H. 972, 380 A.2d 1083 (1977).

And, again, in 1986, the New Hampshire Supreme Court explained in Appeal of Conservation Law Foundation of

New England, Inc., 127 N.H. 606, 637-8, 647 (1986):

> [T]he principles of prudence and usefulness . . .are significantly different in at least one respect that is of great potential significance for the treatment of Unit I expenditure in the light of what due care required at the time an investment or expenditure was planned and made, usefulness judges its value at the time its reflection in the rate base is under consideration.- Under the "used and useful" principle, the commission is not asked to second-guess what was reasonable at some time in the past, but rather to determine what can reasonably be done now with the fruits of investment. It is therefore not surprising that the commission's flexibility in applying the usefulness principle extends to judgments about the inclusion or not of investment in property held for future use. See LUCC, 119 N.H. at 343-44, 402 A.2d at 633-34; N.H.Gas & Elec., 88 N.H. at 55, 184 A. at 605; C. PHILIPS, Jr., supra at 316.
>
> * * *
>
> [I]t is important to bear in mind, as Commissioner Aeschliman's separate opinion indicates, that the principle of used and useful property will also be applicable in determining

> rate base. In the face of rate issues that are unparalleled in the State's history, we should recall that the usefulness principle lends itself to development over time and under new conditions . . . We therefore attend seriously to the suggestions of the separate opinion, that the burden of excess capacity that may be created by such giant projects may appropriately be shared as between investors and customers. . . . , and that the usefulness principle may be applied to effect such a shared allocation. (Citations omitted.)

The legitimate ratemaking expectations of PSNH and its investors under New Hampshire law are summed up in the decision in Petition of Public Service Co. of New Hampshire, 130 N.H. 265, 280 (1988) as follows:

> Any vested right which the company [had] when it commenced construction was a right to the constitutional guarantees of [Federal Power Commission v. Hope Natural Gas Company, 320 U.S. 521, 64 S.Ct. 281, 88 L.Ed. 333 (1944); namely, "just and reasonable rates" based in part upon property used and useful in the generation of electricity. This right exists today. It has

> not been taken away by the anti-CWIP law. Neither the company nor its investors had a vested right to the economic status quo at the time of the investment decision. Such matters as increasing costs, inflation, high interest rates, conservation, the OPEC cartel, and the myriad of other factors affecting business judgment are the concerns of the free market and its forces which ultimately fall upon management to assess. Not all management decisions are reviewable or subject to cure in the judiciary.

It should also be remembered that New Hampshire is a state that does <u>not</u> have as statutory framework which requires <u>prior</u> PUC approval for power plants to be constructed by its regulated utilities. PSNH itself decided to build the Seabrook plant and decided to continue to build the plant even after the costs skyrocketed for various reasons.

The Supreme Court of the United States has indicated in dicta that a "shift in methodologies" by a state

regulatory agency in midstream with regard to the construction of a regulated utility plant might present a question of constitutional due process violation as a "taking" if shown. See Duquesne Light Co. v. Barasch, 109 S. Ct. 609, 619 (1989) ("The risks a utility faces are in large part defined by the rate methodology because utilities are virtually always public monopolies dealing in an essential service, and so relatively immune to the usual market risks. Consequently, a State's decision to arbitrarily switch back and forth between methodologies in a way which required investors to bear the risk of bad investments at some times while denying them the benefit of good investments at others would raise serious constitutional questions.") In the present case the Court inquired as to whether the objectors could show any such shift in ratemaking methodologies on the

part of the New Hampshire which might present a basis for constitutionally-required full recovery of Seabrook costs but in my judgment the objectors were unable to point to any such shift.

This Court does not need to determine for present purposes whether PSNH in a litigated rate case could not obtain some additional rate increases and value for the company but simply whether there is a substantial basis for the expectation voiced by the objectors that such a proceeding would result in recovery in anything close of full cost recovery for the Seabrook plant. It may well be, as objectors argue, that it would be shown in such a proceeding that only a small fraction of the Seabrook construction costs could be considered imprudent in the sense of mismanagement, negligence, or wasteful construction activity. But that cramped view of the

"prudency" concept no longer can be assumed to be a controlling factor in the current regulatory ratemaking process.

The concepts of "prudency" and "used and useful" according to the record before me, and the applicable case law, are evolving concepts that regulators are using to effectuate an appropriate balance in the sharing of costs associated with excess cost power plants between ratepayers and investors. In other words, it is at least arguable, notwithstanding the best management and control of costs in the actual construction of a plant, that the decision to go forward with the construction and completion of the plant may be deemed imprudent if it will result in a power plant coming on line with electricity too expensive to be used at the high rates necessitated by full recovery of the associated construction

costs. Cf . In re Western Massachusetts Electric Co., 80 PUR 4th 479, 542 (Mass. D.P.U. 1986). the same broadened meaning of the "used and useful" concept could also arguably can be applied to effectuate a sharing of costs of such a plant, as indicated in the New Hampshire decisions cited above. The very concept of excess capacity created by a plant too expensive for customers to use is a phenomenon largely attributable to the experience in recent years of massive cost overruns with regard to nuclear power plants.[8]

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[8]The phenomenon was recognized however in other contexts as early as 1949 by the New Hampshire Supreme Court as noted in In re New England Telephone & Telegraph Co. v. State, 95 N.H. 353, 360 (1949), "If as the report of the Commission implies, construction undertaken by the [c]ompany is 'wasteful' or its expense is unwarranted by the demand probable at the necessary price for service produced by it, . . . unwarranted investments may be excluded from rate base, and unjustified expenditures from the determination of a

Even apart from any effect that the 1987 write-down might have in a rate case, the record before me independently establishes that it would be unlikely that PSNH could recover appreciably more than $1.8 billion in recovery of Seabrook costs in a litigated rate case, and that it is quite uncertain whether even the $1.8 billion is realistically achievable. This record emphatically establishes PSNH in a litigated rate case would have to face vigorous and sustained opposition by the State of New Hampshire, together with various active citizen groups opposing Seabrook and its associated costs.

The argument would be made that at some point in the late 1970s and early 1980s it had to be obvious to PSNH management that the kilowatt capacity costs and charge rates per kilowatt hour

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reasonable return." (Emphasis added)

attributable to full recovery of the Seabrook construction and completion costs were going out of sight; that the company had numerous warnings from the NHPUC and the New Hampshire Supreme Court regarding the ultimate balancing that would have to be done in determining the reasonable rates for the company; that the GAAP accounting realities would limit any phase-in and deferral of costs to a 10-year maximum period; and that at a total cost recovery level the collectable rates that could be charged and recovered in the real world simply would not support full recovery of the Seabrook investment.

If it were assumed for present purpose that PSNH could establish in a litigated rate case that it was "entitled" to full recovery of its Seabrook investment, under current ratemaking principles, the record does

not indicate any likelihood that such costs could be recovered out of rates within a time frame permissible under current accounting and regulatory policies. The evidence is uniform that under current accounting standards and practices no regulated utility has been able to show as current assets on its financial statements any assets whose costs could not be recovered in a 10-year period.

While the RKR objectors have put forward interesting and imaginative arguments and theories as to why GAAP principles and the FAS-71 requirement should be disregarded in this context, to permit greater recovery over a longer time period of the Seabrook costs, that accounting approach admittedly is unconventional and has not been used by any utility or regulatory agency to date. If such an unconventional approach is to

be established it probably will require a strong, highly solvent utility with the necessary financial staying power to litigate the matter in a regulatory proceeding and associated appeals for the time necessary to overturn the current accounting and regulatory practices in that regard. PSNH simply is not in that strong financial position and therefore this Court cannot find a reasonable likelihood that if it denied confirmation of the pending Plan the company in fact would achieve the "breakthrough" in current practices that the objectors desire.

Moreover, regardless of a successful result in a regulatory proceeding, to adopt unconventional cost recovery and accounting practices with regard to the Seabrook plant, there still remains the "real world" effect of such practices in terms of reaction by the financial

markets and utility analysts who would be essential to the issuance of future securities and public debt necessary, not only for the initial cash requirements of a reorganization plan, but also necessary to finance the reorganized company's ongoing operations. The record before me is replete with various question marks and uncertainties as to the market reaction in that regard that could interject into any renewed reorganization plan proceedings a significant question of feasibility in terms of such necessary financing and access to the capital markets in that context.

Finally, it has to be recognized that while Court for present purposes has to balance various "likelihoods" in making a surface determination as to whether the plan compromise is fair and equitable, and a better result than could be obtained in a litigated rate case, the

one thing that is not uncertain is the inexorable accruing of further massive amounts of additional claims by the senior interests above the common stockholders during the period of delay necessary to achieve the greater value in a litigated rate case. It is the net result that is crucial to the equation in evaluating the position of the common stockholders. In my judgement it is likely that it would take approximately three years to get through the 18-month NHPUC process and the inevitable appeals in the New Hampshire Supreme Court and the United States Supreme Court. However, even if it were assumed that the novel position espoused by the RKR objectors could be established in only two years, that lesser period of delay still would result in such substantial additional obligations ahead of the common stockholders that it would be very

unlikely that the net result of value flowing down to the common stockholders would be appreciably greater than that presently available under the confirmed plan of reorganization.[9]

Accordingly, for all the reasons indicated above, the Court concludes that the Rate Agreement compromise embodied in the Plan of Reorganization is within the range of expectable results from a litigated rate case and is in fact fair and equitable in the circumstances; and furthermore that the Plan does not violate the provisions Section 1129(a)(7) of the Bankruptcy Code in that the class

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[9]During their oral argument on this matter counsel for the Creditors Committee stated that for the creditor group itself the company would "need to get a homerun in the Seabrook rate case to cover us" when the costs of delay are considered. Counsel for the Equity Committee amended that by noting that "the numbers are so large, you don't have to hit a homerun, you have to hit a grand slam. . . ."

to which the objecting common stockholders belong would not in any event achieve a greater recovery if the Plan is denied confirmation and the case proceeded under Chapter 7 of the Code.

DATED at Manchester, New Hampshire this 17th day of May, 1990.

JAMES E. YACOS

JAMES E. YACOS
BANKRUPTCY JUDGE

INDEX TO OPINION

ANNEX

MEMORANDUM OF THE STATE OF NEW HAMPSHIRE REGARDING THE UTILITY RATEMAKING PROCESS

(Docket No. 33572 - Filed April 11, 1990)

E X T R A C T S

The State of New Hampshire submits this Memorandum in response to the request of the Court made at the hearing held on April 5, 1990, relating to the proposed confirmation of the Third Amended Joint Plan of Reorganization filed by Northeast Utilities Service Company, et al.

* * *

I. Nature and Role of PUC in Ratemaking

No public utility is permitted to charge any amount for any service except as provided in its tariff on public file at the Commission. At its most basic, then, a rate proceeding is a process by which the Commission approves changes in tariff provisions.

The New Hampshire Supreme Court has characterized tariff provisions as involving more than contractual obligations of the utility and its customers. Tariff provisions have the "force of law". See Appeal of Pennichuck Water Works, 120 N.H. 562, 566 (1980). In that same case, the Supreme Court characterized the nature of the PUC's action in setting rates as "essentially a legislative function." As a result, tariff provisions are subject to the limitations of Part 1, Article 23 of the

New Hampshire Constitution prohibiting retrospective laws. Ibid. pp. 565-566.

Although this function is "legislative", the PUC is, nonetheless, an agency constituted within the executive branch of State government. The Commissioners are appointed by the Governor and Council and the rulemaking and adjudicatory proceedings of the Commission are governed by the State Administrative Procedure Act, RSA Chapter 541-A and due process requirements of the New Hampshire Constitution. See Appeal of Concord Steam Corp., 130 N.H. 422 (1988).

* * *

II. Description of PUC Rate Proceedings

* * *

The PUC's tariff filing rules are contained at New Hampshire Admin. Rules, PUC 1601.1-1603.09. These rules require the utility commencing a rate case to provide not less than thirty nor more than sixty days' notice to the Commission. The filing requirements for such a case require the utility essentially to file its direct case with the request for an increase in rates, together with numerous additional items. While the filing requirements a r e substantial, they are intended to avoid delay by requiring the utility to file at the outset those items which would almost certainly be obtained later in the case through discovery.

Once the utility makes the necessary filing, including revised tariff pages, the PUC must determine

within thirty days whether to allow the tariff change to become effective or to suspend the effectiveness of the tariff revision pending investigation by the Commission RSA 378:6. Obviously, unless the change is de minimis, the Commission takes the latter course. The Commission will then issue an Order of Notice setting the matter for a pre-hearing conference. At the pre-hearing conference, a procedural schedule is set and a first effort is undertaken at narrowing the issues for decision. Discovery generally proceeds in the form of data requests, which are interrogatories and requests for the production of documents. The number of data requests will vary depending on how complex and how controversial the issues of the case may be. In a straightforward case where the utility has fully complied with the tariff filing requirements, the number of data requests mat be fairly limited. However, the number of data requests can be substantial. For instance, in the pending rate proceeding involving New England Telephone and Telegraph Company, DR 89-010, the number of data requests addressed to New England Telephone from the Commission staff and the other parties to the case has numbered in excess of 1,400. It is certainly safe to assume that the number of data requests in a case involving an adjudication of the prudence of expenditures for Seabrook would generate a substantial amount of data requests.

The procedural schedule will call for the pre-filing of testimony by the participants in the proceeding including, in addition to the petitioning utility, intervenors and staff. The schedule may

also accommodate rebuttal testimony. Each instance of the filing of testimony will be followed by a period for discovery with respect to that testimony. One or more conferences among the parties and the Commission staff are generally held for the purpose of discussing the potential for settlement and at a minimum narrowing the issues to be litigated. Finally, hearings are held before the Commission. If there are matters which have been settled, those matters are presented for approval by the Commission. Matters which have not been settled or which are the subject of settlement agreements that are not approved by the Commission are adjudicated in the hearing process.

Under RSA 378:6, the Commission's final decision on permanent rates must be made within one year following the rate case filing, except in the instance of an addition to rate base which exceeds 50 percent of the utility's existing capital investment, in which case the decision must be rendered within 18 months. This decision can be appealed pursuant to RSA Chapter 541; there are no statutory time limit on action by the Supreme Court or by the PUC on remand.

Under RSA 378:27, the Commission is authorized to approve temporary rates pending the final decision. Generally, temporary rate orders allow for increases or decreases with respect to items which appear from a preliminary review of the rate case filing to be likely to be allowed in any event. If the rate increase allowed in the permanent rate order at the end of the case provides for an increase in excess of what has been

allowed in temporary rates, the utility is permitted to recoup the difference between what it would have charged had it had rates during the temporary rate period been set at the permanent rate level and what was actually charged. This amount is normally collected over time in the form of a surcharge. Similarly, if the permanent rate order results in rates that are lower than the temporary rates, the difference in levels for the period of the temporary rates must be refunded by the utility to customers in the manner directed by the Commission.

If temporary rates are not allowed, the utility is permitted to place the entire amount of the rate increase into effect under bond six months after the originally proposed effective date of the tariff pursuant to RSA 378:6. If the rate increase allowed in a permanent rate order is less than this full amount, the difference between the amount collected under bond and the amount which would have been recovered at the permanent rate level must be refunded to customers.

III. The Ratemaking Formula

A. In General

The basic ratemaking formula has been described by the New Hampshire Supreme Court in the case of Appeal of Conservation Law Foundation, 127 N.H. 633-648(1986). Basically, the utility is permitted to earn a reasonable rate of return on amounts prudently expended for property used and useful in providing service to the public after allowed expenses. This amount is the "revenue requirement" of the public utility.

The determination of the revenue requirement is made by examining the financial performance of the utility during a historical period and extrapolating therefrom the likely future financial performance of the utility. The historical period selected is called "test year." The Commission will examine the expenses incurred during that test year, the amount invested in capitalized assets (the "rate base"), and the return earned by the utility. See Appeal of Public Service Company of new Hampshire, 130 N.H. 748, 758 (1988); New England Tel & Tel. Co. v. State, 113 N.H. 92, 95-96 (1973).

B. The "Rate Base"

Amounts included in rate base consist primarily of amounts invested in items of real and personal property used in the utility business less accumulated depreciation. For electric utilities, these items include primarily generating stations, substations, transmission lines, distribution lines and various office and other types of buildings used in providing electric service. With respect to items which are allowed to be included in rate base, the utility is permitted to receive a return "of" and "on" amounts invested in those assets. The return "of" the investment is provided in the form of an allowance of depreciation or amortization as an expense. The return "on" those items is provided through the allowance of the rate of return on the unamortized balance.

In addition to costs associated with physical property, certain expenditures

by the utility which warrant recovery over a period of longer than one year are capitalized and amortized over a longer period. The requirement to capitalize such amounts and the amortization periods may be prescribed within the Commission's Uniform System of Accounts or by specific Commission order.

The rate base will usually also include a working capital allowance to provide investors with a return on funds made available by the utility to pay expenses before revenues to cover such expenses are recovered from customers.

Whether an item will be permitted to be included in rate base will depend on whether and to what extent expenditures were "prudently incurred" and whether the resulting asset is "used and useful" in providing service to the public.

* * *

In measuring rate base, the New Hampshire PUC has generally used a rate base which is averaged over the entire test period as opposed to looking at account balances as they exist on any single date.

Because the nature of the process is to take a historical period and project from it future results, the PUC will also take into account certain known and measurable changes. Accordingly, if there have been substantial changes in the rate base which will definitely affect future financial results, these known and measurable changes may be reflected. The inclusion of such changes, however, is tempered by the "matching" requirement, namely, the requirement to

match expenses with revenues. Many times new investment will result in new revenues. Therefore, care is taken to make sure that the reflection of known and measurable changes does not have the effect of overstating or understating the likely effect of the change on ultimate operating income. See Appeal of Manchester Gas Co., 129 N.H. 800, 806 (1987).

The rate base is also adjusted to reflect certain deferred taxes. See Appeal of Public Service Company of New Hampshire, 130 N.H. 748, 757-760 (1988).

C. Expenses

The Commission will also look in detail at expenses which are included within the test year. Expenses will be excluded for ratemaking purposes where they have been imprudently incurred or where they are incurred for non-utility purposes or are otherwise unnecessary for the conduct of the company's utility business. Expense amounts will also be adjusted for known and measurable changes. New expenses which are likely to be experienced prospectively may be included as pro-forma adjustments to the test year expense amounts. Expenses which are not likely to recur will be correspondingly excluded.

Based upon the foregoing analysis, the Commission will determine a pro-forma rate base and the pro-forma expense level that will be used in determining the revenue requirement.

Generally, then, items included in test year expenses are recovered through

rates in current annual revenues. There is a recovery "of" these amounts, but because they are recovered currently, the ratemaking process does not provide a return "on" these amounts )other than indirectly to a certain extent through the working capital allowance). This is in contrast with rate base amounts which are recovered over a longer period with a return being provided on the unamortized balance.

E. Return

Next in the analysis is the determination of the allowed rate of return. The allowed rate of return allowed is required to be not less than the utility's cost of capital. The cost of debt capital is a matter which can be readily determined based upon the interest rate of the debt and the amortization of any issuance expenses, premium and discount. The same is substantially true for any preferred stock which the utility may have outstanding, the terms of which will be established by the utility's Articles of Incorporation. The more difficult matter is the determination of the cost of common equity. This determination will involve the testimony of experts. The Commission in recent years has generally followed a discounted cash flow analysis in determining the cost of common equity. The Commission may also consider the "risk methodologies. See Morin, Roger, Utilities Cost of Capital, Public Utility Reports, Inc., 1984; Gordon, Myron J., The Cost of Capital to a Public Utility, MSU Public Utility Studies, 1974; Kolbe, A Lawrence, et al. The Cost of Capital --- Estimating the Rate of

Return for Public Utilities, MIT Press, Cambridge, Mass. 1984; Philips,Charles F.,Jr., The Regulation of Public Utilities, 2d Ed., Part II (Theory of Public Utility Regulation), Public Utility Reports, Inc., 1988. See also Appeal of Public Service Company of New Hampshire, 130 N.H. at 751-757.

Based on this analysis, the cost of each component of capital is determined and weighted in accordance with the proportion of that component to the total amount of capital. The Commission may also look at whether the utility's capital structure is appropriate. In doing so, the Commission will examine whether the capital structure provides the utility with sufficient strength to withstand potential economic adversity and to have access to the capital markets in order to raise the funds necessary to invest in plant necessary to meet the requirements of service to the public. The Commission may also look at the economic efficiency of the capital structure. Among the factors the Commission will consider are the costs savings which can result from debt capital through the deductibility for tax purposes of interest payments. However, the Commission will also consider the impact of the risks associated with leverage on the cost of debt and equity capital. Generally, the Commission will be looking to a capital structure which provides long-term strength for the utility and which is likely to produce the lowest overall cost of capital in the long run. In an appropriate case, the Commission may determine the allowed rate of return on the basis of an imputed capital structure rather than the actual capital structure recorded on the

utility's books of account. See, Appeal of Conservation Law Foundation, 127 N.H. at 635-636; New England Tel & Tel. Co. v. State, 98 N.H. 211, 220 (1953).

An additional factor which may be reflected in the return is an "attrition" allowance. This kind of an allowance is more traditionally included in an environment of high inflation, where the simple fact of inflation is likely to result in a failure of the utility to earn its allowed rate of return on a go-forward basis even if the utility preforms exactly as contemplated in the pro forma test year calculation. Other arguments with respect to potential attrition in specific areas and its ratemaking treatment may also be made.

F. Calculation of Required Increase

The Commission next compares the pro-forma net operating income of the utility for the test period with the amount which results from the multiplication of the rate base times the allowed percentage rate of return. If the pro-forma net operating income is less, the amount by which it is less is the "revenue deficiency" to be recovered through increased rates. If the utility is a private corporation required to pay income taxes, the deficiency will be grossed up for the amounts by which the rate increase will necessarily increase the expenses for federal and state income taxes (including the State franchise tax imposed under RSA 83-C). This deficiency, grossed up for the tax effect, is the amount of the required rate increase.

The Commission then determines the rate classes from which the increase will be collected in the manner described in more detail in the Prior Memorandum [filed by State of New Hampshire on March 8, 1988, Docket No. 337, at Court request discussing NHPUC regulation].

APPENDIX L

UNITED STATE BANKRUPTCY COURT
DISTRICT OF NEW HAMPSHIRE

IN RE

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, Debtor

CHAPTER 11
Case No. 88-0043

GENERAL FINDINGS OF FACT AND CONCLUSIONS OF LAW RE PLAN CONFIRMATION ISSUES

[EXTRACTS]

* * *

35. Harry Saxon, a holder of PSNH preferred stock, has filed an objection to confirmation alleging that the Plan unfairly discriminates against $25 par value preferred shareholders when compared to the treatment of $100 par value preferred shareholders. That objection is without merit. The Plan provides for payment to preferred shareholders on the basis of the par value of their stock, and disregards accrued but unpaid dividends. The fact that some

preferred shareholders are giving up more dividends than others, or that the market prices for preferred stock may not have reflected the differences in the par value, does not warrant a finding that the Plan dis-criminates against some shareholders. To the extent compromises were reached in the treatment of preferred shareholders, these compromises were reached and approved by the Equity Committee and overwhelmingly accepted by preferred shareholders. These compromises in fact were part of the "give ups" negotiated to allow value to get down to the common shareholder class as part of achieving a consensual plan of reorganization. The fact that similar treatment may lead to different rates of return for some shareholders does not change the fact that they are all treated similarly under the Plan. Mr. Saxon's Objection is hereby denied.

APPENDIX M

THIRD AMENDED DISCLOSURE STATEMENT OF NORTHEAST UTILITIES SERVICE COMPANY PURSUANT TO SECTION 1125 OF THE BANKRUPTCY CODE

[EXTRACTS]

II. INTRODUCTION

* * *

D. COMMITTEES

* * *

2. Equity Committee
[p. 11]

As a result of the different priority of the Existing PSNH Preferred Stock, the Existing PSNH Common Stock and the Warrants, whose holders' interests are represented by the Equity Committee, the potential rights of the constituencies represented by the Equity Committee differ and may conflict. All of the current members of the Equity Committee are holders of Existing PSNH Preferred Stock except one, Martin Rochman, who holds only Existing PSNH

Common Stock and has voted against the Committee's position on the Plan. Certain members of the Committee are holders of both Existing PSNH Preferred Stock and Existing PSNH Common Stock. No members of the Equity Committee hold Warrants.

* * *

III. THE DEBTOR

* * *

J. EMPLOYEE SEVERANCE BENEFIT MODIFICATIONS

NU and PSNH have agreed to ask the Bankruptcy Court to approve a stipulation (the "Stipulation") that would modify certain of the employee benefit arrangements previously put in place by PSNH, subject to Bankruptcy Court approval, and which were subject to various objections before the Bankruptcy Court as originally proposed. References to PSNH in this discussion of the

Stipulation include references to Reorganized PSNH after the Effective Date. The Stipulation provides that the employment agreements previously entered into by PSNH with its five most senior managers would be amended to provide termination benefits of two times the employee's then effective annual salary (plus accumulated vacation) (the original employment arrangements with these persons provided for termination benefits for a period of three times such amounts); for a continuation of medical, dental and life insurance benefits for a period of two years following termination (the original agreements provided such benefits for three years); for two years' additional credit under the PSNH pension plan and excess benefit plan upon termination (the original agreements provided for three years' credit); and for the deletion of a provision that

would have obligated PSNH to make certain tax indemnity payments to such employees.

In addition, the Stipulation provides that the Special Severance Pay Plan put into place on September 13, 1989 (subject to approval of the Bankruptcy Court) for the benefit of 51 key employees of PSNH would be amended to provide: that a required relocation outside of PSNH's service territory within 18-months following a change in control of PSNH (such as the Effective Date) would be "good reason" for the resignation of a covered employee, entitling the employee to the benefit of the Special Severance Pay Plan upon such a resignation (the original Special Severance Plan provided that relocation beyond a twenty-mile radius of the employee's prior job site gave rise to "good reason" to resign); that severance

benefits under the Special Severance Pay Plan would be equal to 1 1/2 weeks' salary for each 6 months of service, with a minimum of one year's salary for all vice presidents, corporate secretary and corporate controller (the prior minimum was one and one-half year's salary), and a minimum of one year and a maximum of one and one-half years' salary for all other covered employees (the prior maximum was two years' salary); and added an early retirement benefit for covered employees with 20 years of service with PSNH who had reached their 55th birthday prior to the 90th day after Confirmation, and who elect to retire on or prior to such date.

The Stipulation also provides that the amendments to the PSNH Pension Plan adopted in September, 1989, would be canceled (those amendments had provided for an early retirement program for all

employees in the event of a change in control).

* * *

V. DESCRIPTION OF THE PLAN

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C. CLASSIFICATION AND TREATMENT OF CLAIMS AND INTERESTS

[pp. 25]

* * *

12. Class 11 (Preferred Stock)

[pp. 32]

* * *

The following table sets forth the Equity Committee's estimate of the range of values of the distribution under the Plan to holders of Allowed Claims and Interests in Class 11 in several different scenarios. In each scenario, the "best case" is one in which the

Petition Date Amount of Allowed Claims in Classes 10 and 10A total $857,400,000 and the book value adjustment is a positive $10,000,000, and the "worst case" is one in which the Petition Date Amount of Allowed Claims in Classes 10 and 10A total $900,000,000 and the book value adjustment is a negative $10,000,000

| | Total Estimated Value(a) | Percent of Total Par Value(b) | Percent Total Claims(c) |
|---|---|---|---|
| Seabrook Operating and Merger Occurs(d) | | | |
| best case | $337.0 | 104.9% | 69.7% |
| worst case | $325.2 | 101.2% | 67.3% |
| Seabrook Operating and No Merger Occurs(d) | | | |
| best case | $326.1 | 101.5% | 67.5% |
| worst case | $314.3 | 97.8% | 65.0% |
| Seabrook Canceled and Merger Occurs(e) | | | |

| | | | |
|---|---|---|---|
| best case | $209.5 | 62.5% | 43.3% |
| worst case | $155.2 | 48.3% | 32.1% |

| | | | |
|---|---|---|---|
| Seabrook Canceled and No Merger Occurs(e) | | | |
| best case | $194.9 | 60.6% | 40.3% |
| worst case | $140.6 | 43.7% | 29.1% |

---

(a) Assumes value of Reorganized PSNH Common Stock if $20.00 per share, value of Contingent Notes is 122% of face (principal) amount, and value of each NU Warrant is $200.

(b) Total par value of outstanding Preferred Stock is $321.4 million.

(c) Total Preferred Stock claims are $483.3 million, including par value of $321.4 million and pre-Petition Date accrued and unpaid dividends of $161.9 million.

(d) Assumes issuance of maximum potential principal amount of Series C Contingent Notes.

(e) Assumes Seabrook Unit No. 1 is

canceled prior to the Effective Date.

* * *

13. Class 12 (Common Stock)

* * *

| Seabrook Operating and Merger Occurs(c) | Total Estimated Value(a) | Estimated Value Per Share(b) |
|---|---|---|
| best case | $163.5 | $3.88 |
| worst case | $112.7 | $2.67 |
| **Seabrook Operating and No Merger Occurs(c)** | | |
| best case | $157.6 | $3.74 |
| worst case | $106.8 | $2.53 |
| **Seabrook Canceled and Merger Occurs(d)** | | |
| best case | $ 41.0 | $0.97 |
| worst case | $ 32.7 | $0.78 |
| **Seabrook Canceled and No Merger Occurs(d)** | | |
| best case | $ 38.8 | $0.92 |
| worst case | $ 30.5 | $0.72 |

(a) Assumes value of Reorganized PSNH Common Stock is $20.00 per share, value

of Contingent Notes is 122% of face (principal) amount, and value of each NU Warrant is $2.00

(b) Based on 42,154,548 shares of Existing PSNH Common Stock outstanding.

(c) Assumes issuance of maximum potential principal amount of Series C Contingent Notes.

(d) Assumes Seabrook Unit No. 1 is canceled prior to the Effective Date.

* * *

VI ACCEPTANCE AND CONFIRMATION

[pp. 68 TO 70]

* * *

E. CONFIRMATION WITHOUT ACCEPTANCE BY ALL IMPAIRED CLASSES

[pp. 69 to 70]

* * *

If a class of equity security interests rejects the Plan, the Plan may still be confirmed so long as the Plan provides either that :(i) each holder of

an interest included in the rejecting class receive or retain on account of that claim property which has a value, as of the Effective Date, equal to the greatest of the allowed amount of any fixed liquidation preference to which such holder is entitled, any fixed redemption price to which such holder is entitled, and the value of such interest; or (ii) the holder of any interest that is junior to the interests of such class will not receive or retain any property at all under the Plan on account of such junior interests.

NUSCO has requested in the Plan that if necessary the Plan be confirmed pursuant to Section 1129(b) of the Bankruptcy Code.

* * *

VII BEST INTERESTS

[pp. 70 to 74]

* * *

## A. GENERAL RULES APPLICABLE TO A SEABROOK RATE CASE

As a regulated utility, PSNH has certain rights and responsibilities. It is obligated to provide safe and reliable service on a non-discriminatory basis to all who request service. It must also conform to regulations with respect to the provision of its services to the public and limit its charges to the rates approved by regulatory agencies, most importantly the NHPUC. On the other hand, PSNH and its investors are entitled under state and federal law to just and reasonable treatment, including a fair opportunity to earn a reasonable return on capital invested to serve the public. Regulatory agencies are not required to follow any specific regulatory approach, but the end result of regulation must be fair to investors as well as consumers.

And, while regulatory agencies are afforded a great deal of discretion, policies or practices that are clearly unreasonable and result in significant financial harm to a utility or its investors have been held to violate the due process protections of the United States Constitution.

Traditional ratemaking and current New Hampshire law would permit the NHPUC to determine whether to allow inclusion in rates of all or part of PSNH's investment in Seabrook, once Seabrook begins "actually provid[ing] service to consumers." N.H. Rev. Stat. Ann. 378:30-a(the anti-CWIP law). PSNH contends that this investment will be approximately $2.9 billion at January 1, 1990, including $1.6 billion in carrying costs.

The fixed rate increases provided in the Rate Plan are lower than the rates which PSNH contends it would be entitled

to collect under traditional ratemaking principles, once Seabrook is providing service to consumers and rate changes are authorized by the NHPUC. In effect, implementation of the Plan will result in recovery of $1.4 billion, or approximately 50%, of the Seabrook investment.

B. MAJOR ISSUES PRESENTED BY SEABROOK IN RATE CASE

The extent to which the investment in Seabrook would be reflected in PSNH's rates following a Seabrook rate case would depend on the NHPUC's findings on three issues; the prudence of the Seabrook investment, the extent to which the investment in the facility is "used and useful", and avoidance of "rate shock".

1. Prudence.

Under New Hampshire law, only that portion of an investment that is

"prudently incurred" may be reflected in rates. An investment is "imprudent", and excluded from rates, to the extent that (i) it was "forseeably wasteful" based on information available to the utility at the time the investment was made or (ii) the cost is excessive due to imprudent construction management. The factual analysis associated with prudence determination is lengthy and complex, and the facts are subject to a variety of conclusions.

2. Used and Useful.

Investment in a facility may be recovered in rates only to the extent that the facility is "used and useful" to the utility franchise--in other words, that the facility is necessary and economic in meeting PSNH's requirements to provide adequate electric service to New Hampshire customers. The NHPUC has been accorded wide flexibility to apply

this principle as a means of sharing the excess capacity burden between investors and customers. In a Seabrook rate case, the NHPUC would be asked to determine what could reasonably be done with the Seabrook investment as of the time of the "used and useful" determination. Among other considerations, at issue could be whether and how long any portion of Seabrook power or capacity would be excess to the needs of PSNH's retail customers.

3. Affordability of Rates.

The NHPUC is given wide latitude to establish "just and reasonable" rates. As the New Hampshire Supreme Court has said, "[t]he traditional ratemaking process gives the commission flexibility to accommodate the legitimate interests of both customers and investors in responding to the extraordinary issues disclosed by [PSNH's Seabrook

investment]." Appeal of Conservation Law Foundation, 127 N.H. 606, 648 (1986). "There is substantial economic leverage to establish a rate level that will not be oppressive to consumers or the New Hampshire economy or which is unfair to stockholders. Id. at 644, quoting the NHPUC, Re Pub. Serv. Co. of N>H>, 66 PUR 4th 349, 423 (1985).

If a rate increase or series of increases is too high or comes too quickly, it might adversely affect the New Hampshire economy or adversely affect PSNH's markets for electricity by depressing demand or driving customers from the system, a phenomenon commonly referred to as "rate shock". It is likely that the NHPUC would not permit inclusion in rates of PSNH's entire Seabrook investment at one time, since to do so might require rate increases which would be too high or come too

quickly. Accordingly, PSNH would likely propose a rate moderation plan incorporating either or both of two ameliorative concepts: (i) one which would recognize a recovery of less than PSNH's full $2.9 billion investment or (ii) a gradual increase in rates over a number of years, based on the rate increase "phase-in" concept included in the Rate Plan.

C. CONDUCT OF A RATE CASE

In a Seabrook rate case, as in any rate case, the burden of proof would be upon PSNH on all issues, including the extent to which its Seabrook investment was prudent and the extent to which the Seabrook facility is "used and useful". The NHPUC would have up to 18 months to decide the case and establish ne permanent rates. It is possible that the NHPUC could implement a temporary rate increase during the pendency of the case.

It is also possible that the NHPUC, in the exercise of its own discretion or at the Bankruptcy Court's request, could adopt expedited procedures that would very substantially reduce the time needed for its review. Substantial opposition to both temporary and permanent rate increases can be expected from other instrumentalities of the State and intervenor groups seeking to minimize the amount of Seabrook investment to be recognized for ratemaking purposes. It cannot be predicted how long a Seabrook rate case proceeding would actually test, whether or at what level temporary rate increases would be allowed during the pendency of the proceeding, or the extent to which the Seabrook investment would actually be recognized for ratemaking purposes as the result of such a proceeding.

D. POSSIBLE OUTCOME OF A SEABROOK RATE

CASE

1. Possibility of Full Recovery

Under traditional utility ratemaking as practiced by the NHPUC and the FERC, if Seabrook were to commence commercial operation PSNH could request that its full investment in Seabrook Unit No. 1 be reflected in rates as of thee in-service date of the unit. Assuming that Seabrook began providing service to consumers January 1, 1990, the investment in Seabrook would be approximately $2.9 billion, including nuclear fuel. Inclusion of $2.9 billion in rate base on an average basis, assuming a recognized cost of capital which is lower than the currently allowed cost of capital, represents an overall rate base value of approximately $3.4 billion. PSNH performed an analysis based on a December 31, 1988 test year that indicated that a rate increase equivalent to a one-time

increase of approximately 89% would be necessary to support such a $2.9 billion addition.

PSNH has stated that it would seek recovery of $1.8 billion of its Seabrook investment in a Seabrook rate case, assuming that Seabrook becomes operational in the early part of 1990.

2. Prudence of Seabrook Investment.

In a Seabrook rate case, PSNH would contend that its Seabrook investment was prudently incurred. In support of this position, it could point to several audits of the Seabrook project which, in general, found the project to have ben managed prudently. For example, an audit conducted by an independent consultant selected by the NHPUC found that 93% of the Seabrook investment, at the time construction was completed in October of 1986, had been prudently incurred. The audit findings, however, have not been

adopted by the NHPUC, and very likely would be contested by various parties in a Seabrook rate case. It should also be noted that a prudence audit conducted for the CDPUC found that 25% of the Seabrook investment was imprudently incurred and should be disallowed.

3. Used and Useful Nature of Seabrook.

Under New Hampshire's anti-CWIP statute, PSNH's Seabrook investment may not be reflected in rates until the plant is actually providing service to consumers, which PSNH believes will occur when Seabrook starts supplying net electrical output to the NEPOOL grid. This could be achieved as early as two weeks after Seabrook receives its full power authorization. However, the statutory phase "actually providing service to consumers" has not previously been applied and may be subject to an interpretation that would require

additional conditions to be met.

PSNH believes Seabrook's operation will enhance the reliability of PSNH's service to its customers by adding capacity necessary to meet the growing demand for electricity in its service territory, as well as enhancing NEPOOL reliability by adding needed capacity to the New England region. Currently, PSNH is purchasing approximately 350 MW to service that demand and meet its NEPOOL obligations through short-term purchases from sources which may not continue to be available. Even with Seabrook on line, forecasted amounts of surplus capacity are relatively small and would last only through 1993, assuming a 2.3% growth rate. Factors such as higher growth rates or a delay in Phase II of the Hydro Quebec interconnection could cause PSNH to be without this surplus at an even earlier period. The "used and useful"

issue, however, would be a matter of contention in a rate proceeding, and PSNH's conclusion would be subject to challenge as to both the need for and cost of Seabrook capacity.

4. Affordable Rate Levels.

A study completed in early 1989 for PSNH by outside economic consultants Bower Rohr & Associates indicates that a one-time nominal rate increase that averages 31% and varies among customer classes with annual increases thereafter at the rate of inflation is affordable, that is, both bearable and feasible. The consultants also reviewed a rate plan consisting of five annual step increases with an aggregate rate level effect somewhat less than the 31% one-time increase, and increases under conventional rate making thereafter, and found that this lower level of aggregate increase was also bearable and feasible.

The Bower Rohr & Associates study was in part based upon a review and assessment of related studies done by PSNH personnel and other consultants, which reached similar conclusions. The level of rate increases considered by these studies is significantly higher than the increases included in the Rate Agreement.

The studies included examinations of the price elasticity of demand for electric energy, the price and availability of alternative sources of energy, the possibility of industrial customers relocation or use of cogeneration facilities, and the extent to which higher electric rates might result in the establishment of municipal electric departments to serve their residents directly, Also considered were the effects that higher electric rates might have on the economic and social well-being of customers.

The conclusions reached in PSNH's studies were that while there would be some social and economic effects and some loss of sales to PSNH from the increases under review, the higher rates would not cause undue social disruption or economic hardship, or shrinkage in size of PSNH as an energy provider. The issue of elasticity of demand, however, is complex, and studies conducted by others would likely be offered to show that the customer response to such increases would be more severe.

5. Recent Seabrook Settlements

There have been two recent rate case settlements in other jurisdictions in which the recovery of the Seabrook investment of other utilities was determined. In one case, the New England Electric System was granted recovery of $326 million of its $543 million investment in Seabrook (60%) if the plant

operates and $282 million (52%) if the plant does not operate. In the second case, United Illuminating was allowed recovery of $640 million of its $1.182 billion investment in Seabrook (52%). Each of the utilities had also been permitted to recover a portion of its Seabrook related costs during construction. If the prior cost recovery is considered, the percentage of total investment recovered would be higher. The settlements also involved the resolution of non-Seabrook issues which resulted in additional benefits to the utilities.

It is not possible, however, to know for certain whether the results of a Seabrook rate case would be more or less favorable than the recent settlements.

6. Comparative Advantages of Proposed Rate Plans and a Seabrook Rate Case.

PSNH has indicated that in a Seabrook rate case it would seek recovery

of $1.8 billion of its investment in Seabrook, approximately $400 million more than would be realized for the benefit of creditors and shareholders under the Rate Agreement. There can be no assurance, however, that PSNH would be successful in recovering $1.8 billion of its Seabrook investment in a rate case, nor can it be known for certain what level of recovery the NHPUC actually would approve. It is reasonable to assume that a Seabrook rate case would be vigorously contested and that various parties would urge recovery of a lesser amount.

There are numerous risks presented by a rate case that would be avoided under the Rate Agreement. For example, implementation of the Rate Agreement would mean that PSNH would achiever rate increases, and corresponding values, regardless of whether or when Seabrook

runs, and regardless of any of the risks attendant to a litigated rate case.

Implementation of the Rate Agreement also means that PSNH is assured of certain rate increases throughout the term of the Rate Agreement, rather than being exposed to the risk that subsequent proceedings might minimize whatever gains were achieved in a Seabrook rate case. In addition, the Rate Agreement allows the Reorganization Case to be resolved sooner, thus allowing distribution of recoveries sooner than would be likely if a fully contested Seabrook rate case were pursued instead.

For the foregoing reasons, NUSCO believes that the Plan is in the best interests of creditors and stockholders when compared with this alternative.

* * *

EXHIBIT C
[to the Disclosure Statement]

FORM 10-K
PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE
For the fiscal year ended
December 31,1988

[EXTRACTS]

* * *

Item 8: FINANCIAL STATEMENTS AND SUPPLEMENTARY DATA

* * *

Notes to Financial Statements

* * *

3. Change is Seabrook Accounting and Losses on Generating Projects

The Company's financial difficulties are directly related to the magnitude of its investment in Seabrook and to the Company's inability to base its rates upon the cost of this project prior to its operation (currently assumed to be January 1, 1990 for financial planning purposes). The Company determined that, should the Seabrook Plant be permitted to become operational, political and

competitive pressures would not permit the Company to recover the recorded cost of its investment in accordance with traditional utility ratemaking practices. Accordingly, in 1987 the Company changes its method of accounting for its investment in Seabrook to eliminate AFUDC from capitalized costs and to recognized capitalized interest and associated income tax effects. This change in method of accounting effectively restated the cost basis of Seabrook to eliminate the previously assumed effects of regulation. the 1987 financial statements reflect this change as if it had occurred at January 1, 1987.

In 1988 the Financial Accounting Standards Board issued definitive guidance to be followed in situations where the recorded cost of investments would not be recovered through traditional ratemaking practices. While

the new accounting standard would provide for treatment of the event as an extraordinary item, rather than as a change in accounting principle, the overall result of the application of the new standard would not produce a result materially different than the accounting followed by the Company in 1987, and accordingly, no restatement of that accounting has been made. The new standard would not require the elimination of the previously assumed effects of regulation and restatement of assets, unless, as was the case for the cost basis of Seabrook, there was impairment.

Management has determined that further cost capitalization in connection with Seabrook would not be prudent and therefore ceased capitalizing such costs effective December 31, 1987. Accordingly, a loss of $212.0 million was recognized

in 1987 associated with estimated remaining costs to be incurred prior to an assumed operating date of January 1, 1990. The loss provision of $212.0 million included interest of $70 million relating principally to interest on secured debt. It did not include a provision for interest on unsecured debt after January 28, 1988. During 1988 $109.5 million was charged to the accrual, including the $47.5 million of capitalized interest associated with the Seabrook investment. The Company has not changed Seabrook's assumed operational date for financial forecast purposes of January 1, 1990. If there are delays in that date, Seabrook costs, approximately $8 million of each month of delay will have to be accrued by the Company when the delay becomes probable.

* * *

Item 12. SECURITY OWNERSHIP OF CERTAIN BENEFICIAL OWNERS AND MANAGEMENT

Reference should be made to the information furnished in the tabular listing of Directors of the Company under "Item 10. Directors and Executive Officers of the Registrant" for information as to the shares of stock owned by Directors of the Company.

To the knowledge of the Directors, no person owns beneficially as much as 5% of the outstanding shares of Preferred Stock, $25 par value. The following table sets forth information with respect to shares of Common Stock and Preferred Stock, $100 par value, owned beneficially as of March 16, 1989 by all persons who are known by the Directors to own beneficially more than 5% of the outstanding shares of either Common Stock or Preferred Stock, $100 par value.

Preferred Stock, $100 par value.

| | | | |
|---|---|---|---|
| The Prudential Insurance Company of America [address omitted] | 90,000 | Record and Beneficial | 14.64% |
| The Mutual Benefit Life Insurance Company [address omitted] | 56,400 | Record and Beneficial | 9.18% |

Common Stock, $5 par value

| | | | |
|---|---|---|---|
| The Manufactures Life Insurance Company [address omitted] | 3,467,025 | Beneficial | 8.53%(1) |
| Donald Smith & Co., Inc. [address omitted] | 2,730,275(2) | | 7.34% |

(1) According to a Schedule 13G dated February 6, 1985 filed by the Manufacturers Life Insurance Company, it beneficially owns currently exercisable warrants to purchase 3,467,025 shares of common stock, or 8.5% of the outstanding shares of Common Stock, assuming exercise by Manufacturers of the warrants and that no other warrants are exercised.

(2) According to a Schedule 13G dated February 6, 1989 filed by Donald Smith & Co. Inc. an investment management firm, the firm owns 2,730,275 shares of Common Stock on behalf of certain beneficial owners:

The following table sets forth information as of March 16, 1989, with respect to the number of shares of Preferred Stock and Common Stock and number of warrants owned beneficially by all Directors and officers of the Company as a group:

| Class | Number of Shares or Warrants | Percent of Outstanding Class |
|---|---|---|
| Common Stock | 18,222 | 0.05% |
| Warrants to Purchase Common | 8,000 | 0.04 |
| Preferred Stock $100 par value | 112 | 0.01 |
| Preferred Stock $25 par value | 2,320 | 0.02 |

APPENDIX N

UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEW HAMPSHIRE

In re:

Bankruptcy Case No.

Public Service Company of New Hampshire 88-00043

VOLUME I

Manchester, N. H.

April 4, 1990

Wednesday, 9:30 A.M.

HEARING RE: CONFIRMATION HEARING REGARDING THE CHAPTER 11 PLAN OF REORGANIZATION

BEFORE; The Honorable James E. Yacos, Bankruptcy Judge.

* * *

[pp. 132 to 158]

MR. SAXON: Your Honor, my name is Harry Saxon, I reside in Lakewood, New Jersey. I am a private investor and have been a stockholder in Public Service of New Hampshire since 1979. My current holdings in Public Service of New Hampshire include 1100 shares of $25 par value Preferred E and 519 shares of $25 par value Preferred C. I became involved

in this after receiving the voluminous Third Amended Plan of Reorganization by Northeast Utilities.

THE COURT: If you will excuse me one moment.

MR. SAXON: Yes

THE COURT: Go ahead, counsel, or Mr. Saxon.

MR. SAXON: Yes, Your Honor.

THE COURT: You have been an equity holder, a stockholder since when?

MR. SAXON: 1979, that was originally common stock and I began purchasing the preferred in 1984. I believe it was 1984, and I currently, I had a greater position at one time but currently own 1619 shares.

THE COURT: You own 1600 of what?

MR. SAXON: I own 1100 of the $25 par value Preferred E and 519 of the $25 par value Preferred C.

THE COURT: You own any common stock?

MR. SAXON: Not at this time.

THE COURT: Did you own any at the time the case was filed in January of 1988?

MR. SAXON: When I received the copy, in fact, I received 6 copies because of my various holdings of the voluminous Plan of Reorganization. I became incensed at what I considered the unfairness and the injustice involved in the Equity Committee's decision to base their distribution solely on par value and I voiced 2 objections to this Court.

The first one was based on my thoughts that it was unfair, unjust, and then after getting more information about the constitution of the Equity Committee, I realized that the Equity Committee itself or I believe the Equity Committee itself was not representative of the vast majority of shares of preferred shareholders.

THE COURT: Let me get this straight, you own preferred 100 preferred and 25 preferred?

MR SAXON: I own one, $25 par preferred.

THE COURT: All these shares are $25.

MR. SAXON: YES

THE COURT: All right, and your objection, I gather, is that the Equity Committee had more members with the higher preferred stock?

MR. SAXON: Well, not just more but it was packed with hundred dollar par value preferred shareholders or represented.

MR. BERMAN: Object to that characterization.

THE COURT: I understand, you will be able to respond. What I'm trying to get clear is what's the nature of the object ion with regard to the present plan? The committee was selected by the U.S.

Trustee in early 1988. You realize this Court does not select the committee members?

MR. SAXON: I do realize that, Your Honor.

THE COURT: No one until this hearing and I think when Mr. Richards first raised an issue in late December has ever challenged the makeup of the Equity Committee, so what is it you're asking me to do, deny confirmation of the plan because the committee is not representative?

MR. SAXON: I ask you for denial of confirmation of the plan.

THE COURT: I will do one of 2 things this week or next week or whenever I do it is to confirm the plan or deny the confirmation of the plan, those are my choices.

MR. SAXON: I would like the Court to see fit to redirect the allocation,

whatever was allocated to preferred shareholders in a more equitable manner.

THE COURT: And how do you read that distribution now and how would you think it would be more equitable?

MR. SAXON: Your Honor, I have a formal response of Mr. Berman and Mr. Nolan to my objections and I would like to reply to that, and in this response, I also have suggestions for a fair distribution of the stocks.

THE COURT: Well, that raises a problem, although it can be waived, and that is you were supposed to reply to those responses before this hearing.

MR. SAXON: I voiced my objections.

MR. NOLAN: I waive it, Your Honor. He can speak.

THE COURT: Is it waived?

MR. NOLAN: Yes.

MR. SAXON: They cannot indicate anybody.

THE COURT: Equity Committee waive?

MR. BERMAN: Yes, your Honor.

THE COURT: All right, then I will receive your response. They have waived any objection to the procedure.

MR. SAXON: Mr. Berman, Attorney for the Official Committee of the Equity Security Holders.

THE COURT: You want to file that with the Court?

MR. SAXON: I will file it when I have read it.

THE COURT: You don"t have one for me to look at? You give be the original and you can look at a copy. I will have it filed. Stephen, file it and docket it as supplemental objection by Saxon.

MR. NOLAN: Response technically, reply?

THE COURT: Well, it's really a reply. Docket it as supplemental reply by Saxon.

MR. SAXON: Mr. Berman, in a footnote on Page 2 of his response to my objection, dismisses my claims by repetition of his claim that my contentions are groundless but offers no real justification for the position, merely by repeating, you know, it's fair, it's fair.

THE COURT: Well, I would suspect this has something to do with the fact that the 100 preferred stock had more rights than the 25 preferred. You don't accept that? What is the contention? Maybe I'll hear Mr. Berman explain what their position is.

MR. SAXON: The contention is that the committee did not properly represent the vast number of preferred shareholders, preferred shares. I shall be precise. There are 13 different classes of preferred, 6 of $100 par value and 7 of $25 par value.

THE COURT: You're not a lawyer, are you?

MR. SAXON: No, I'm not.

THE COURT: I'll explain something about the procedure here that I think you need to understand. What I have before me is not the committee per se. I have before me a question about the plan and whether the treatment under the plan is or is not in accordance with the Bankruptcy Code. Now, if there's something improper about the plan treatment, you will tell me that but the fact that the committee is or is not made up one way or another is not an issue directly before me.

No one challenged the committee prior to this plan going out, prior to the Disclosure Statements being heard and I understand that you now want me to do something about the committees.

MR. SAXON: No, I don't, Your Honor.

THE COURT: All right, then, regardless of how it happened, what is unfair, improper about the plan, that's the focus that I need?

MR. SAXON: All right, maybe I will have to skip part of this. Mr. Berman argues that the voting results verify his contentions that the vast majority of preferred shareholders considers the plan fair and that is absurd. Only 10 percent of the $25 par value preferred shareholders voted. It is reasonable to assume that a like percentage of $100 par value preferred would vote if the plan were fair, but over 56 percent of the $100 par value preferred shares were voted. This statistically significantly difference probably stems from the fact that the $100 par value were privileged shareholders.

THE COURT: You say 10 percent of them actually voted?

MR. SAXON: That's right.

THE COURT: And the others?

MR. SAXON: 56 percent.

THE COURT: Of the.

MR. SAXON: $100 par value.

THE COURT: 50 percent?

MR. SAXON: 56 percent of the $100 par value.

THE COURT: And how much of the 25.

MR. SAXON: 10.

MR. NOLAN: Well, I'm going to object if Your Honor is taking this as the truth.

THE COURT: Wouldn't it appear by arithmetic in the Disclosure Statement?

MR. NOLAN: That's not the vote. I have the vote.

THE COURT: The numbers you have certified compared to the outstanding shares?

MR. NOLAN: Exactly.

THE COURT: You're saying it's

different than 10 percent?

MR. NOLAN: That's correct.

THE COURT: You can put that in the record and I'll consider it.

MR. SAXON: I have taken the figures from Mr. Berman's letter to me quoting the actual number.

THE COURT: All right, that is disputed and the proponents will direct my attention to something else.

MR. SAXON: I personally know $25 par value voted in favor of the plan upon receipt of their forms but I could find no one who had read the reorganizational plan or really knew what the plan offered, and upon a detailed explanation, some were infuriated and wished they had voted against the plan. Some stockholders were so disgusted, they voted for the plan to simplify the resolution of the bankruptcy.

THE COURT: The important point is

that there has to be some procedure to get a vote to get the plan before the Court to get confirmation, if it's appropriate, and get the company out of the Courts. That's what reorganization is about. Many people have second thoughts throughout this process.

MR. SAXON: But Mr. Berman interprets the voting results as a clear indication of fairness.

THE COURT: Your main point is I shouldn't consider that such overwhelming support.

MR.SAXON: That's right.

THE COURT: All right, I'll take your comments into account.

MR. SAXON: If only 12.2 percent voted to accept the plan, how can Mr. Berman logically interpret this to mean that, I quote, "The vast majority of preferred shareholders consider the plan fair."? I will concede the fact that,

based on the voting record, the $100 preferred shareholders do consider the plan good for them.

THE COURT: You're aware under the Bankruptcy Law, it's the parties that actually act that get to vote.

MR. SAXON: I'm aware after that.

THE COURT: And those that do not act are voting in a way, in effect, saying we don't care.

MR. SAXON: Both Mr. Berman and Mr. Nolan elaborated on classification and treatment of classes which I have not and do not question. I have not and do not object to the total allocation for distribution to the preferred shareholders, that is not my argument. Neither attorney addresses the fact that equal treatment accorded preferred shareholders under the Joint Plan would be more equitable if the amount available for distribution to preferred

shareholders be distributed to preferred shareholders be distributed based upon call price, which approximates par value, or a combination of par value plus accrued dividends such as the recommendation of Public Service of New Hampshire in their Plan of Reorganization dated December 27, 1988.

Either of the above methods would, in my opinion, be less discriminatory to Class 11 preferred shareholders than the current plan which is based solely on par value.

THE COURT: Are you reading from this document you just handed up?

MR. SAXON: Yes.

THE COURT: Where did that appear?

MR. SAXON: It's the center of Page 3.

THE COURT: Just a minute.

MR. SAXON: Mr. Nolan in his response on the bottom of page 4, in your

letter to me, cites pari passu in the sharing of bankruptcy recoveries, then says each holder within Class 11 is receiving the same treatment. This is misleading and deceptive.

To illustrate, in this bankruptcy, under Class 10, there are 14 3/8 percent debentures due 1991 and 15 percent debentures due 2003. Although they are in the same class and have identical par value, the final distribution to the 15 percent debenture holders, formulated by the Creditors Committee, will be slightly more than the distribution given the 14 3/8 percent debenture holders. If this distribution is proper under Class 10, I don't see any reason why it cannot be applicable under Class 11 to preferred shareholders.

In summary, 78 percent of all preferred shares were not represented on the Equity Committee. 83 percent of the

$25 par value preferred shares had not representation on the Equity Committee, yet a hundred percent of the $100 par value preferred shares were fully represented and even the alternate on the Equity Committee represent $100 par value preferred share interest.

These facts verify the inequity in the makeup of the equity committee. The Equity Committee's recommendation that distribution be based solely on par value obviously discriminate against $25 par value preferred shareholders.

THE COURT: Say that again. Is that in here?

MR. SAXON: Yes, that is the conclusion on the last page, Page 4.

THE COURT: Where is that?

MR. SAXON: The last page.

THE COURT: Where on the page?

MR. SAXON: About 6 lines down, 7 lines down.

THE COURT: All right.

MR. SAXON: The Equity Committee's recommendation that distribution be based solely on par value obviously discriminates against $25 par value shareholders and that is demonstrated by the voting results. Less than 1 percent of $100 par value preferred shares voting were voted to reject the plan, and over 8 percent of the $25 par value preferred share were voted to reject the plan.

THE COURT: All right, I think I understand your contentions. I will hear the responses and then you will have a chance to respond.

MR. SAXON: Thank you. I thank the Court for the opportunity to voice my objection and trust that your final decision of this matter will sustain the valid objection I have raised.

THE COURT: All right, I will consider your comments and I'll hear any

response. Go ahead, Mr. Nolan.

MR. NOLAN: If Your Honor please, I don't think it's clear but I did not hear Mr. Saxon say that he wanted Your Honor to deny confirmation of the plan. I think you asked him that at one point, it may have gotten lost, and I think he said he did not want that result. His complaint, Your Honor, is with the split in Class 11 between the $100 preferred and the 25.

If I could refer Your Honor again to the Certificate of Voting which is Docket No. 3431, there is an Affidavit in that submission from the First National Bank of Boston and that sets forth the tallies separately calculated for the $100 par value and the $25 par value. Mr. Saxon's statements concerning the numbers of voters in the $25 par value class is in error and let me explain why.

Although the tally from the First

National Bank of Boston states 1,002,483 voted from the $25 par value, in accordance with the By-Laws of PSNH, there actually were 4 times that number of shares voted. The By-Laws of PSNH provide for one-quarter of a vote for $25 par value and a full vote for the $100 par value, so that, of course, would be a logical result, I think, under the Bankruptcy Code as well and no matter, for the purpose of determining whether or not the vote was accepted, its immaterial because of the percentages whether you count them one vote for the 25's and one for the 100's.

THE COURT: I take it he's not challenging acceptance, he's referencing the argument that that overwhelming approval by this class is not to be taken at face value because of his calculations.

MR. NOLAN: He calculated that only

10 percent of the $25 par value shares voted. Its 42 percent, Your Honor, and of that 42 percent, 91.97 percent voted in favor of the plan and a 42 percent turnout I think is reasonably good as bankruptcy cases go.

With respect to the method for distribution of Class 11, Your Honor, that is based on par value and I think it's expected that if everything goes well, the holders of Class 11 will get their par value back and I think we are really fighting over nothing because everyone, I believe, in this case is being treated the same way.

They are all going to get their par value and I could see if there was going to be something more than par value, where there would be disparity based on a different rate but that is not the case here and I think under the law, the classification of both sets of preferred

in Class 11 is proper. Once they are in the same class, they have to get the same treatment, the treatment is reasonable and I think under the Bankruptcy Code, that means that Mr. Saxon's objection should be overruled.

THE COURT: Well, he indicated that the debtor's original 1988 plan provided for a different distribution on a different basis relating to call prices par value plus accrued dividend, what is your response?

MR. NOLAN: Your Honor, there were 4 plans and I lost track of how many variations of those plans there were, how many different amendments and that's not the plan that's being offered.

THE COURT: I understand, and I'll ask the Equity Committee why they agreed to this plan in that context. Do you have any other comments?

MR. NOLAN: No, sir.

THE COURT: All right, the Equity Committee?

MR. BERMAN: Your Honor, the primary rationale was one of the major give-ups here by the preferred shareholders was all the pre-petition accrued dividends that flowed down to the benefit of the common and, accordingly, the distribution under the plan was designed to try to get everyone at par value and treat everyone the same in that fashion, and we believe it has been voted on favorably, I think over 92 percent, and its's fair and reasonable.

THE COURT: In other words, there was a deliberate decision made to change from the debtor's original distribution to par value so that additional value could get down to common?

MR. BERMAN: Yes.

MR. RICHARDS: Your Honor, can I be heard on this?

THE COURT: You want to object to anything that gets more down to common, you can't be heard on that, sir, that's not relevant, but I will hear Mr. Saxon back if he has any additional comments.

MR. SAXON: Well, it seemed to me quite clear that the Equity Committee itself was prejudicial in their proposed plan for distribution of the funds and I think I proved that.

THE COURT: They represented both preferred and common.

MR. SAXON: I know that there was only one representative for the common.

THE COURT: There's only one committee. Nobody asked for a separate committee for the common.

MR. SAXON: I am aware of that and that's not my contention.

THE COURT: Until the Disclosure Statement Hearings were closed.

MR. SAXON: It's the makeup of the

preferred representatives of the Equity Committee that disturbs me.

THE COURT: I understand all that but their explanation is not uncommon in a Consensual Plan or allegedly a Consensual Plan in which you give up something to lower classes so that they don't force litigation and endless delay, and maybe you don't come out as good as giving up something now, that's basically, I gather, what happened.

MR. SAXON: But even here now, Mr. Berman still does not explain why another method of distribution of the final allotment cannot be made.

THE COURT: Because that isn't the bargain, this in not the bargain. You understand this is a bargaining situation?

MR. SAXON: Yes.

THE COURT: Common could say, we don't accept this plan, we want to

litigate until 2,001 and we'll risk everything and then we lose our shirts and maybe we'll gain greatly, but if you tell them you will get nothing, they will risk their shirts.

MR. SAXON: But I'm not asking for anyone to get less but certainly the minority members of the preferred shareholders, they would get a slight amount less.

THE COURT: You're within the preferred?

MR SAXON: Within the preferred.

THE COURT: This par thing applies to both, does it not?

MR. BERMAN: Yes, Your Honor.

MR. NOLAN: He's not asking that the plan not be confirmed, he's asking, I believe, that there be a reconfiguration of the distribution in Class 11, is that right?

MR. SAXON: Yes.

THE COURT: I cannot do that in this hearing. I can deny confirmation because it doesn't comply with the law and maybe if I do that, maybe people will negotiate it differently but maybe they don't. What I do have before me is a question of confirmation or not confirmation. You don't like that feature of the plan, you think it could have been done otherwise.

MR. SAXON: I see no reason why it shouldn't, this was done in Class 10.

THE COURT: All right, well, I'll review your letter and then the plan and Disclosure Statement again before I rule on this matter.

MR. SAXON: I understand, Your Honor, that the final decision rests with this Court, you, and that if you wish, you could rule in my favor and say that the amount that was allocated for preferred shareholders be distributed in a more equitable manner to the $25 par value

preferred shareholders.

THE COURT: All right, Mr. Berman, why don't I just do that? It will be a lot simpler.

MR. BERMAN: It's already been voted on, Your Honor.

THE COURT: If I did it, what would happen?

MR. BERMAN: We would go back to square 1.

THE COURT: We would have to have a new vote. You can't take away from people who voted on this plan something and say you voted for this plan but when it came to confirmation, we changed it and took something away from you and didn't give you a chance to vote for it. You can't do that. You want to take something from the 100 and give it to the 25?

MR. SAXON: Yes.

THE COURT: All right, they voted on a different plan. How do you think I can

just do that because you think it will be better and you would get more?

MR. SAXON: Well, in the case of the warrant holders where they voted to reject it, don't you have the power to say well?

THE COURT: Because there is nobody below the warrant holders, for one reason. All right, well, look, I will consider your comments. I really don;t know that I have much choice other than confirm or not confirm but I will review your comments.

MR. SAXON: Thank you, Your Honor.

UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEW HAMPSHIRE

In re:

Public Service Company of New Hampshire

Bankruptcy Case No. 88-00043

VOLUME V

Manchester, N. H.

April 12, 1990

Thursday, 9:30 A.M.

HEARING RE: CONFIRMATION HEARING REGARDING THE CHAPTER 11 PLAN OF REORGANIZATION

BEFORE; The Honorable James E. Yacos, Bankruptcy Judge.

* * *

[pages 152-155]

THE COURT: All right, I'll rule on the admissibility of these exhibits. The Court has before it exhibits, Richards Exhibits 107 through 119 which have been marked for identification and there has been considerable inquiry and voir dire on the foundation basis for the admission of these exhibits as evidentiary exhibits.

In my judgment, these exhibits are a form of argument but are not evidence as such and for that reason, I will sustain the objection.

The inquiry has indicated here that the witness has approximated the NU Plan to his own liking and for his own purposes and has come up with, for the benchmark exhibit which is 111, a picture of the NU Plan that involves many of his own assumptions and not the assumptions underlying the NU Plan.

That, in my judgement, distorts, eliminates the reliability of the other exhibits for the purposes offered.

Beyond that, with regard to the charts themselves, I think they are subject to the same weakness since they are based upon the underlying data exhibits, the printouts and the computer returns, but more importantly, they are misleading in that the interesting

information that a PUC Commission would be interested in a litigated rate case I think is off these charts.

It is in the future since it's obvious to me from everything I have heard that the whole approach by this objector or these objectors is to backload the recovery of the Seabrook costs in the future, so I think the charts, if they are to be meaningful in terms of evaluating the litigated rate case should show the whole picture, that is what would it look like 10 years out and not only 10 years out but 15 years out, 20 years out, maybe 40 years out.

The Examiner brought that point out pretty clearly, and I believe that in that sense, these charts are not appropriate.

Now, as evidence, in terms of argument, I will give these objectors as well as the proponents a chance after

they conclude the evidence in this case to argue, as they will, from this record and any assumptions or inferences that you can make, including the concept of alternative depreciation methods or alternative accounting methods.

That is my ruling on these exhibits. They will not be received in evidence. So ordered.

We'll take a 10 minute recess.

(Thereupon, a 10-minute recess was taken, after which the following proceedings were had:)

THE COURT: I want to state for the record an additional ground of denial of those exhibits. This hearing is a hearing on approval, confirmation of a Plan of Reorganization which embodied within itself a compromise with regard to a litigated rate case.

In that context, it is essential to show the alternative available in

liquidation which would be the litigated rate case before the PUC. The exhibits proffered raise so many collateral issues as to the underlying data that it would appear to me that I would, in effect, be conducting a rate case were I to allow these to come in and allow the necessary cross examination in the development of the underlying data before I could give them any weight in that context, so for that reason as well, I don't believe it's appropriate to receive these as evidentiary exhibits for the purposes indicated.

As I indicated, the objectors can argue to this Court at the conclusion of the evidence what they believe might happen in a litigated rate case in terms of different theories and approaches in recovering the cost of Seabrook. So noted.

APPENDIX O

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF
NEW HAMPSHIRE

In re

| | |
|---|---|
| PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, a/k/a "Public Service of New Hampshire" "PSNH" "New Hampshire Yankee" | Chapter 11 Case No. 88-00043 |

Debtor

SECOND REPORT OF EXAMINER

July 28, 1989


| | |
|---|---|
| George A. Hahn, Esq. | Mr. Paul L.Gioia |
| Attorney for Examiner | Examiner |
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[EXTRACTS]

* * *

[P. 18]

I did not comment on the various provisions of the proposal, but indicated my belief that the value proposed [ $1.85 billion] was not sufficient to provide

the basis for a consensual plan, nor was it, in my view, a reasonable level of valuation. Northeast expressed confidence that its ability to pay cash to the creditors would gain their support and that it would be able to "cram down" the Equity. The plan called for full recovery for Secured Investors, 90% of the pre-petiton claims of the Unsecured Investors, mostly in cash, and $165 million for the Equity, if they voted for a consensual plan and nothing if they opposed it.

* * *

[p. 19]

The State representatives indicated that they were not contending that the proposed recovery [$ 2.2 billion proposed by the Examiner] was outside the range of reasonableness from a regulatory point of view, but that in order for them to gain the public support of the State's

political leadership a proposal would have to represent an outcome that was more favorable than what might be expected to result from the regulatory process.

* * *